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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]149

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
PLAINTIFF IN ERROR,

vs.

ROBERT T. CREEK.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

FILED [illegible]

(27,824)

(27,934)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 577.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

ROBERT T. CHEEK.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 28, 1921.

a STATE OF MISSOURI:

In the St. Louis Court of Appeals.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Appellant.

Præcipe.

The Clerk will include the following in preparing the record upon writ of error to the Supreme Court of the United States:

1. The complete abstract of the record as originally filed in the Supreme Court of Missouri, and certified to the St. Louis Court of Appeals.

2. All record entries in the Supreme Court of Missouri.

3. Copy of opinion, judgment, and order transferring case to St. Louis Court of Appeals.

4. Copy of motions filed subsequent to the opinion in the Supreme Court, together with record entries thereon.

5. All additional and subsequent record entries.

6. All record entries in the St. Louis Court of Appeals.

7. Opinion, judgment, and order of the St. Louis Court of Appeals.

8. Motions filed subsequent to opinion and judgment, together with all record entries thereon.

b 9. All additional and subsequent record entries in the St. Louis Court of Appeals.

10. Petition for Writ of Error.

11. Stipulation waiving bond and issuance of citation.

12. Assignment of Errors.

13. Writ of Error showing return, together with usual certificates.

FORDYCE, HOLLIDAY & WHITE.

[Endorsed:] In the St. Louis Court of Appeals, State of Missouri. Robert T. Cheek, respondent, vs. Prudential Insurance Co. of America, a corporation, appellant. Præcipe. Fordyce, Holliday & White, attorneys and counselors, 506 Olive street, St. Louis, Mo.

c PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Plaintiff in Error,

vs.

ROBERT T. CHEEK, Defendant in Error.

The President of the United States to the Honorable Judges of the St. Louis Court of Appeals of the State of Missouri, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you or some of you, between Robert T. Cheek, respondent, and Prudential Insurance Company of America, appellant, your Court being the highest court of said State having jurisdiction of the cause, there was drawn in question the constitutionality of Section 3020 Revised Statutes of Missouri, 1909, under Section one of Article 14 of the Amendments to the Constitution of the United States, and

Whereas, there is manifest error in said decision to the damage of Prudential Insurance Company of America, the petitioner in error, and,

Whereas, we are willing that if there is error it should be duly corrected,

We command you, therefore, if judgment be given therein that you send under seal of your Court, the record and proceedings in said cause to the Supreme Court of the United States, together with this writ, within such time as may be necessary in order that you have the same at Washington on the 11th day of October,
d 1920, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of United States, the 8" day of July, A. D. 1920. Issued at office in St. Louis, Mo., under seal of District Court, the day and year last aforesaid.

[Seal of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri.]

W. W. NALL,
Clerk of the District Court of the United States,
Eastern Division of the Eastern District of Missouri.
By IRVINE MITCHELL,
Chief Deputy.

Approved & allowed.
GEO. D. REYNOLDS,
Presiding Judge of the St. Louis Court of Appeals, State of Missouri.

[Endorsed:] Prudential Insurance Co. of America, a Corporation, plaintiff in error, vs. Robert T. Cheek, defendant in error. Writ of error. Fordyce, Holliday & White, Attorneys and Counselors, 506 Olive Street, St. Louis, Mo.

STATE OF MISSOURI:

In the St. Louis Court of Appeals.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Appellant.

To the Honorable the Presiding Judge of the St. Louis Court of Appeals of the State of Missouri:

Prudential Insurance Company of America, a corporation, appellant in this Court in the above entitled cause, shows by his petition to this Honorable Court that in the records, proceedings and decisions of the St. Louis Court of Appeals of the State of Missouri, same being the highest Court of the State in which a decision could be had in this suit, a manifest error has occurred greatly to the damage of said Prudential Insurance Company of America.

That as appears in the record and proceedings, there was drawn in question the constitutionality of Section 3020 Revised Statutes of Missouri, 1909, under Section One of Article 14 of the Amendments to the Constitution of the United States, and that said Prudential Insurance Company of America was deprived of its property and right of contract without due process of law, in violation of said amendment, all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors, filed herewith.

Wherefore, petitioner prays that writ of error be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such Court in such cases made and provided, and that the same may be by that Honorable Court inspected and corrected in accordance with law and justice.

(Signed) S. W. FORDYCE,
JOHN H. HOLLIDAY,
ALFRED HARRELL,
Solicitors.

Allowed:

(Signed) GEO. D. REYNOLDS,
Presiding Judge St. Louis Court of Appeals, State of Missouri.

STATE OF MISSOURI, *ss:*

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, certify that the above and foregoing is a full, true and complete copy of the

petition for writ of error in the above entitled cause as fully as same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 1st day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk.
H. B. ENGLISH,
Deputy Clerk.

[Endorsed:] In the St. Louis Court of Appeals, State of Missouri. Robert T. Cheek, respondent, vs. Prudential Insurance Co. of America, a corporation, appellant. Petition for writ of error. Fordyce, Holliday & White, Attorneys and Counselors, 506 Olive Street, St. Louis, Mo.

g In the Supreme Court of the United States.

PRUDENTIAL INSURANCE CO. OF AMERICA, a Corporation, Plaintiff in Error,

vs.

ROBERT T. CHEEK, Defendant in Error.

Stipulation.

Come now the Plaintiff in Error and Defendant in Error in the above entitled cause, by their attorneys, and stipulate and agree that defendant in error Robert T. Cheek waives the issuance of citation upon the writ of error from this Honorable Court to the Supreme Court of the United States and agrees to enter his appearances to the October Term, 1920, of said Court, and further stipulates and agrees that he waives and will waive the giving of a bond by said plaintiff in error to perfect its said writ of error.

(Signed) FORDYCE, HOLLIDAY & WHITE,
Attorneys for Plaintiff in Error.
FREDERICK H. BACON,
Attorneys for Defendant in Error.

STATE OF MISSOURI, *ss:*

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, hereby certify that the above and foregoing is a full, true and complete copy of the stipulation filed in the above entitled cause, as fully as same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 1st day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk.
H. B. ENGLISH,
Deputy Clerk.

h STATE OF MISSOURI:

In the St. Louis Court of Appeals.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Plaintiff in Error,

vs.

ROBERT T. CHEEK, Defendant in Error.

Assignment of Errors.

1. The judgment of the St. Louis Court of Appeals deprives the plaintiff in error of its property without due process of law, contrary to Section I of the 14th Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri, (Section 3020 of the Revised Statutes of Missouri for 1909) and the course of judicial construction thereof by the courts of Missouri authorizes the imposition of damages and authorizes the taking of property by pretended processes of law which are not actual processes of law, in that it permits the imposition of damages for the failure of the superintendent of a corporation to give a letter of dismissal to employes quitting the service of said corporation, without requiring the finding or determination of the existence of a contract therefor.

2. The St. Louis Court of Appeals erred in refusing to hold that the court below erred in failing to direct a verdict for the defendant upon the first count of the plaintiff's petition at the close of the plaintiff's case and at the close of the whole case, as requested,
i for the reason that said first count of plaintiff's petition is based upon an alleged violation of Section 3020 of the Revised Statutes of Missouri, 1909, requiring the superintendent or manager of a corporation to give a letter of dismissal to employes quitting the service of said corporation, and for the reason that said statute is unconstitutional and void because in violation of Section I of the 14th Amendment to the Constitution of the United States and in violation of Section 30 of Article II of the Constitution of Missouri, and because the construction thereof by the court constitutes a rule of judicial construction violative of said provisions of said State and Federal Constitutions, and because the application of said statute

to the facts of the case denies the defendant due process of law as guaranteed to it by the Federal and State Constitution.

3. The judgment of the St. Louis Court of Appeals deprives the defendant of its liberty of contract without due process of law, contrary to and in violation of the 14th Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri (Section 3020 of the Revised Statutes of Missouri, 1909) and the course of judicial construction thereof by the courts of Missouri, authorize the imposition of damages flowing from the agreement between insurance companies that such companies would not employ agents of other companies to work in the same district in which said agents had been employed by such insurance companies within a period of two years after such agents had left the employ of said insurance companies.

4. The St. Louis Court of Appeals erred in refusing to hold that the court below erred in failing to direct a verdict for the defendant on the second count of the plaintiff's case and at the close of
j the whole case, as requested, for the reason that said second count of plaintiff's petition is based upon the theory that because of said Section 3020 of the Revised Statutes of Missouri, 1909, the defendant could not lawfully agree with other insurance companies that neither the defendant nor said other insurance companies would employ agents or servants of any one of them to work in the same district in which said agents or servants had been employed by said other insurance companies within a period of two years after said agents or servants had left the employ of said other insurance company, and for the reason that the judgment rendered against the defendant upon said second count of plaintiff's petition deprives the defendant of its property and of its liberty of contract without due process of law, contrary to and in violation of the 14th Amendment of the Constitution of the United States.

5. The St. Louis Court of Appeals erred in failing to hold that the court below erred in giving to the jury the first instruction requested by the plaintiff for the reason that said instruction is based upon said Section 3020 of the Revised Statutes of Missouri, 1909, and for the reason that said statute is unconstitutional and void in that it violates Section 30 of Article II of the Constitution of Missouri and Section I of the 14th Amendment of the Constitution of the United States.

6. The St. Louis Court of Appeals erred in failing and refusing to hold that the court below erred in giving to the jury the second instruction requested by the plaintiff, in that said instruction is based upon the assumption that the defendant could not lawfully agree with other insurance companies not to employ agents or servants of said other insurance companies within two years after said
k agents or servants had left the employ of said other insurance companies to work in the same district wherein they had previously been employed, and for the reason that said action of the

court deprived the defendant of its liberty of contract and of its property without due process of law, in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

7. The St. Louis Court of Appeals erred in holding that Section 3020 of the Revised Statutes of Missouri 1909 as construed by the courts of Missouri, is constitutional and in refusing to hold that said statute as construed deprives the defendant of its property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Wherefore, Plaintiff in Error prays that the judgment herein be corrected according to law and a proper judgment entered.

(Signed) S. W. FORDYCE,
JOHN H. HOLLIDAY,
ALFRED HURRELL,
Attorneys for Plaintiff in Error.

STATE OF MISSOURI, *ss:*

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, certify that the above and foregoing is a full, true and complete copy of the Assignment of Errors in the above entitled cause, as fully as same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 1st day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk.
H. B. ENGLISH,
Deputy Clerk.

[Endorsed:] In the St. Louis Court of Appeals, State of Missouri. Prudential Insurance Company of America, a Corporation, plaintiff in error, vs. Robert T. Cheek, defendant in error. Assignment of errors. Fordyce, Holliday & White, Attorneys and Counselors, 506 Olive street, St. Louis, Mo.

1 16597.

In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

APPELLANT'S ABSTRACT OF RECORD.

Fordyce, Holliday & White, Attorneys for Appellant.
Alfred Hurrell and James Guest, of Counsel.

1½ In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

APPELLANT'S ABSTRACT OF RECORD.

This suit was instituted on the 14th day of November, 1912, in the Circuit Court of the City of St. Louis, Missouri. On February 18th, 1913, the Circuit Court sustained demurrers to both counts of plaintiff's petition, whereupon plaintiff declined to plead further and there was judgment on demurrer for the defendant, from which
2 decision the plaintiff appealed to this Court, which reversed the decision of the court below and remanded the case for trial. See Cheek v. Prudential Insurance Company of America, 192 S. W. Rep. 387.

After the case was remanded, defendant filed an answer and the case went to trial on October 8th, 1917, on the following pleadings:

Petition.

(Omitting Caption.)

For cause of action plaintiff states that the defendant is now, and at all times hereinafter stated was, a corporation under the laws of the State of New Jersey, and doing a life insurance business in the State of Missouri, under license from the insurance department

of said state, and has an office in the City of St. Louis in charge of a superintendent or manager.

That plaintiff for more than ten years last past has been engaged as soliciting agent in the business of industrial and ordinary life insurance and is not experienced in other lines of business, or qualified to earn his living except in the said business of soliciting applications and collecting premiums in the department of life insurance. Plaintiff is now, and has been for more than eight years past, a citizen and resident of the City of St. Louis and has no such acquaintance as would enable him to secure employment, except in the line above stated and in the City of St. Louis.

Plaintiff states that heretofore, to wit, in the month of June, 1898, he entered into the employ of the defendant and continued in the employment of said defendant up to, heretofore, to wit, De-
3 cember 7, 1911, when he resigned the said employment and left the service of defendant; that during the entire period of his employment as aforesaid, he served said company in different capacities, sometimes as assistant superintendent of a department, sometimes as collector and solicitor, and the said company had no cause, and never claimed to have any cause, for dissatisfaction with the services rendered by plaintiff.

Plaintiff states that he had been in the service of said defendant corporation for a period exceeding ninety days, to wit, for fourteen years, and on the 3rd day of October, 1912, demanded a letter from the superintendent of defendant in the City of St. Louis setting forth the nature and character of the services rendered by plaintiff to such corporation and the duration thereof, and truly stating for what cause plaintiff had quit such service. Plaintiff states that heretofore, to wit, on said 3rd day of October, 1912, said defendant through its superintendent or manager of its business in the said City of St. Louis, refused to give plaintiff such a letter as is provided by statute, and plaintiff states that at divers and sundry times between December 7, 1911, and, to wit, October 3, 1912, defendant, through its superintendent and manager in said City of St. Louis, also refused to give plaintiff the letter required by said statute, although demand was made by plaintiff for the same.

Plaintiff states that because of said refusal to give plaintiff the letter required by the statute as aforesaid, he has been unable to secure employment from other life insurance companies in the City of St. Louis in his line of business, and whereas, before leaving said services of defendant he was able to earn, to wit, from one
4 hundred to one hundred and thirty dollars per month, he has been unable to secure employment in his said line of business because of said refusal and has been damaged in the sum of two thousand dollars.

Plaintiff states that said refusal on the part of said defendant, through its said superintendent, or manager, to give him the said letter required by statute, was willful. Wherefore, plaintiff asks judgment for the sum of two thousand dollars actual and three thousand dollars punitive damages.

And for a second and further cause of action plaintiff states that the defendant is now, and was at all the times hereinafter stated, a corporation under the laws of New Jersey and duly licensed to do a life insurance business in the State of Missouri and maintaining an office in the City of St. Louis in said state.

Plaintiff states that the defendant is engaged in the business of industrial and ordinary life insurance, employing a large number of solicitors and agents, and its chief competitors are the Metropolitan Life Insurance Company of the State of New York and the John Hancock Mutual Life Insurance Company of the State of Massachusetts, defendant and said other two companies having a monopoly of the industrial life insurance business in the City of St. Louis.

Palintiff states that he has for the last fourteen years been engaged in the business of soliciting applications and collecting premiums, and assisting in superintending the business of industrial life insurance, and during most of that time has been in the employ of said defendant. Plaintiff states that he is now fifty years old and has no other means of earning a livelihood, except in the business in
5 which he has been engaged for the period aforesaid, and during the said period his earnings have ranged from one hundred to one hundred and thirty dollars per month.

Plaintiff states that heretofore, to wit, on or about December 7, 1911, he resigned from the service of the defendant and sought employment in the same line of business from other corporations engaged in the business of industrial life insurance in the said City of St. Louis, particularly the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company. Plaintiff states that he was unable to obtain employment with any of the said companies because of an agreement between them that neither would for a period of two years from an employe leaving the employ of any other, employ any man who had for any reason left the service of, or been discharged by, either of the other said companies. Plaintiff states that he could have found employment in his line of business with some one of the other companies as aforesaid, if it were not for the said unlawful agreement between the said companies, and plaintiff charges that the said agreement entered into by the said defendant and said other two companies was unlawful, for the reason that it amounted to a practical black-listing of such employe who had left the service of such company. Plaintiff states that not only has he been unable to obtain employment because of said agreement, but in bringing this suit this plaintiff has precluded himself from obtaining employment with either of said companies, or any other engaged in a similar business, because he has been and will be black-listed by the said defendant.

6 Plaintiff states that because of said unlawful conspiracy and agreement on the part of defendant, and said other two companies, he has suffered damage by being unable to secure employment, in the sum of three thousand dollars.

Plaintiff further states that said action of defendant in entering into said agreement, whereby he was prevented from obtaining employment, because of the unlawful agreement aforesaid was willful.

Wherefore, plaintiff asks judgment for the sum of three thousand dollars actual damages and for five thousand dollars punitive damages.

EDWARD H. ROBINSON,
Attorney for Plaintiff.

F. H. BACON,
Of Counsel.

Answer.

(Caption Omitted.)

Now comes defendant, and, leave of Court having been obtained, files its answer to the petition of plaintiff heretofore filed herein, and for such answer to the first count of plaintiff's said petition defendant admits that it is now and at all the times mentioned in said petition was a corporation duly organized under the laws of the State of New Jersey, and doing a life insurance business in the State of Missouri under license from the Insurance Department of said State. And defendant denies each and every, all and singular, the other allegations in the first count of plaintiff's petition contained.

Wherefore, having answered the first count of plaintiff's petition, defendant prays to be hence dismissed.

And for its first affirmative answer to the first count of
7 plaintiff's said petition, and without waiving the denial hereinabove pleaded, defendant avers that said count of plaintiff's petition is founded on Section 3020 of the Revised Statutes of Missouri, 1909, requiring a letter of dismissal to be given employes quitting the service of any corporation doing business in Missouri; that said statute does not impose any penalty upon or give any right of action against said corporation, and that such statute is unconstitutional, in that it is discriminatory and is class legislation and infringes on the right of free speech, all in violation of Section 14 of Article II, of Section 30 of Article II, and of Section 53 of Article IV of the Constitution of Missouri, and that said statute is likewise unconstitutional, in that it attempts to deprive this defendant of its property and right of contract without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Wherefore, having fully answered the first count of plaintiff's petition, defendant prays to be hence dismissed.

And for its answer to the second count of plaintiff's petition, defendant admits that it is and at all the times mentioned in said petition was a corporation duly organized under the laws of the State of New Jersey, duly licensed to do a life insurance business in the State of Missouri. And defendant denies each and every, all and singular, the other allegations in the said second count of plaintiff's petition contained.

Wherefore, having answered the second count of plaintiff's petition, defendant prays to be hence dismissed.

And for its first affirmative defense to the second count of plaintiff's petition, and without waiving the denial hereinabove
8 pleaded, defendant avers that to permit a recovery against this defendant, because of any alleged agreement with other companies that neither would for a period of two years from the time an employe left the employ of any of the other companies employ any man who had for any reason left the service of or been discharged by either of the other said companies, would be to deprive the defendant of its property and of its right to contract, without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Wherefore, having fully answered the second count of plaintiff's petition, defendant prays to be hence dismissed.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

EDWARD D. DUFFIELD,
JAMES GUEST,
Of Counsel.

The trial of said cause was commenced and concluded on said 8th day of October, 1917, in the Circuit Court of the City of St. Louis, being one of the days of the October Term, 1917, of said court, before the Court and a jury.

The jury returned a verdict in favor of the plaintiff in the total amount of $1,500.00, itemized as follows:

First count—

Actual damages	$200.00
Punitive damages	400.00

Second count—

Actual damages	$300.00
Punitive damages	600.00

9 Within four days thereafter, to wit, on the 10th day of October, 1917, being one of the days of said October Term, 1917, of said court, the defendant filed its motion for a new trial and its motion in arrest of judgment, which motions were by the Court taken under advisement.

Thereafter, to wit, on the 5th day of November, 1917, being one of the days of said October Term of said court, defendant's said motion for a new trial and defendant's said motion in arrest of judgment were overruled. Exceptions to all the adverse rulings were duly saved by the defendant, as will appear from the bill of exceptions hereinafter contained.

Thereafter, on the 12th day of November, 1917, being one of the days of said October Term, 1917, of said court, the defendant was allowed sixty days in which to file its bill of exceptions and appeal

bond in the sum of $3,000.00 with surety — was approved by the Court and filed, and defendant filed its affidavit for appeal, which appeal was duly allowed the defendant on said 12th day of November, 1917, to the Supreme Court of Missouri.

Thereafter, on the 28th day of December, 1917, being one of the days of the December Term, 1917, of said court and within the time theretofore allowed by the Court for so doing, the defendant's bill of exceptions was allowed, signed by the Court, filed and made a part of the record herein by an order of court duly entered of record, said bill of exceptions being duly endorsed, "Filed December 28, 1917, Nat Goldstein, Clerk."

10 With caption omitted, said bill of exceptions is as follows:

Bill of Exceptions.

Be it remembered, That at the October Term, A. D. 1917, of the above-entitled court, and on, to wit, the 8th day of October, A. D. 1917, the above-entitled cause came on for trial, and was tried in the above-entitled court before the Honorable Karl Kimmel, Judge of said court, and a jury, and the following proceedings were had, to wit:

Appearances:

E. H. Robinson, Esq., and F. H. Bacon, Esq., for the plaintiff.
Messrs. Fordyce, Holliday & White, by Mr. Holliday, for the defendant.

Whereupon, the plaintiff, to sustain the issues on his part, then offered and introduced the following evidence, to wit:

VERNAL L. TATMAN, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on the part of the plaintiff as follows:

Direct examination.

By Mr. Bacon:

Q. Please state your name.
A. Vernal L. Tatman.
Q. Do you live in the City of St. Louis?
A. Kirkwood.
Q. What is your business?
A. Insurance.

Mr. Holliday: I wish at this time to object to the introduc-
11 tion of any evidence in this case on the following grounds:
As to the first count of plaintiff's petition, the said count fails to state facts sufficient to constitute a cause of action against this de-

fendant, and that, in so far as said first count of plaintiff's petition is grounded on Section 3020 of the Revised Statutes of Missouri, 1909, it fails to state a cause of action against this defendant because said statute is unconstitutional and void, in that it is discriminatory; it is class legislation and infringes on the right of free speech, in violation of Section 14, Article II, Section 30, Article II, and Section 53, Article IV, of the Constitution of the State of Missouri; and the said statute is likewise unconstitutional in that it attempts to deprive this defendant of its property and right of contract without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States. That in so far as the second count of plaintiff's petition is concerned it doesn't state facts sufficient to constitute a cause of action against this defendant; and to permit recovery against this defendant because of any alleged agreement with any other companies that neither of them would, for a period of two years from the time an employe left the employ of any of these companies employ any man who had for any reason left the service of, or been discharged by either of said companies, would be to deprive the defendant of its property and right to contract, without due process of law, in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States.

The Court: The objection will be overruled.

12 To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. How long have you been in that business in the City of St. Louis?

A. Well, about six years, altogether.

Q. State whether or not during that time, from your being engaged in the business of insurance, you have become familiar with the companies doing industrial life business in the State of Missouri, and the amount of business in that line transacted by them.

Mr. Holliday: I object to this question on the ground that the facts sought to be elicited—the evidence—is incompetent, irrelevant and immaterial in this case, and it is no part of any proper cause of action against this defendant what companies are doing industrial business in this State, or how much business they are doing.

The Court: The objection will be overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. I know to some extent.

The Court: I think you ought to qualify this witness as to his answer.

Mr. Bacon: That is the question, whether he is familiar with the companies doing an industrial business, and the amount of business respectively transacted by them.

The Court: Has he been employed by these respective companies?

Mr. Bacon:

Q. Have you been employed by any of the companies
13 doing an industrial life insurance?

Mr. Holliday: Let the record show that I am renewing my objection to all this line of testimony.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. By the Prudential Life Insurance Company.
Q. In what capacity were you employed by the Prudential Life Insurance Company?
A. In St. Louis I was superintendent; in their home office I was district manager and supervisor.
Q. Now, I ask you to state generally——

The Court (interrupting):

Q. How long were you employed by the Prudential?
A. Altogether fifteen years or more.

Mr. Bacon:

Q. Do you know whether the John Hancock Life Insurance Company, the Prudential Life Insurance Company and the Metropolitan Life Insurance Company are doing an industrial life insurance business in the City of St. Louis?
A. They are.
Q. And state whether or not these three companies have been engaged in that business in the state for the last six or seven years.
A. Yes, sir.
Q. Are there any other companies doing an industrial life insurance business in the City of St. Louis to any extent, and, if so, how much?

Mr. Holliday: I object to that question because of its immateriality, and on the further——
The Court (interrupting): The objection to that question will be sustained. Doesn't your petition set out that they are
14 the only companies doing an industrial business?
Mr. Bacon: I set out in the petition that these three companies have a monopoly of the business.
The Court: Wouldn't it be a conclusion of the witness?
Mr. Bacon: I asked him whether or not there were any other companies to any extent.
The Court: The objection to the question in its present form will be sustained.

Mr. Bacon:

Q. Are there other companies competing with these three companies in the industrial line of insurance in the City of St. Louis?
A. Not many.
Q. What companies, if any, transact both life insurance and an industrial insurance business in the State of Missoupri?

Mr. Holliday: I don't think that is proper form for the question; let's get the facts.
The Court: He wants the witness to name the companies; I will let him answer the question.

A. There is — called the Quick Pay Life; a company called the American Life and Accident, the Reliable Life and Accident, and there may be one or two others.

Mr. Bacon:

Q. Have you any knowledge of their business?

Mr. Holliday: I object to that question.
Mr. Bacon: If he knows.
The Court: I think you ought to qualify the witness to answer a question like that.
Mr. Bacon: I will withdraw it.

The Court:

Q. You mentioned the Quick Pay Life?
A. Yes, sir.
15 Q. What other company?
A. The American Life and Accident; the Reliable Life and Accident, and one or two other companies.
Q. You don't know their names?
A. I don't recall them.

Mr. Bacon:

Q. You know, in a general way, what proportion of the industrial life insurance business is transacted by these various companies; just yes or no?
A. Yes; I do.
&. Now, state what proportions of the business of industrial lief insurance companies is transacted by these various companies, if you know, in the City of St. Louis?

Mr. Holliday: I don't think that is a proper question. In the first place, I still maintain it is incompetent, irrelevant and immaterial to the issues in this case, and, further, I don't think it is proper for Mr. Tatman to testify here, as a matter of conjecture or guess on the subject which is, of course, absolutely regulated by the Insurance Department of the State, and there are public reports; where it is a matter susceptible of proof by the reports of

the State Department of Missouri I don't think he ought to testify to that.

The Court: I think the witness has qualified himself to answer the question because he has answered that he knows what these companies do, what they do in the industrial life line. The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

16 A. In the City of St. Louis the Metropolitan Life Insurance Company and the Prudential Life Insurance Company do the largest business by a big proportion.

The Court:

Q. You were asked what proportion.
A. I would say about 75 per cent.

Mr. Bacon:

Q. How about the John Hancock?
A. They would rank third among the companies.
Q. And what proportion of the business is done by these competing companies, other than the three large companies?
A. Very little.

Cross-examination.

By Mr. Holliday:

Q. Mr. Tatman, were you ever in the employ of the Prudential Life Insurance Company?
A. Up until February, 1912.
Q. Have you been with any other insurance company since then?
A. Yes, sir.
Q. Which company have you been with?
A. Reliable Life and Accident.
Q. That is one of the companies you mentioned here as engaged in industrial insurance?
A. Industrial life.
Q. When you left the employ of the Prudential, did you go directly to the Reliable Life Insurance Company?
A. The following Monday.
Q. Now, I understood you to mention three companies outside of the Prudential, Metropolitan and the John Hancock, who are engaged in the business of selling industrial life insurance in the City of St. Louis?
A. Yes, sir.
Q. They were, first, the Quick Pay Life; second the American Life and Accident?
A. Yes, sir.

Q. And third, your company, the Reliable Life and Accident?
A. Yes, sir.
17 Q. Now, can you remember other companies which are engaged in that business here?
A. I don't recall the names.
Q. You know there are other concerns, do you not, who sell this same kind of weekly insurance?
A. I don't know that any others are doing business in St. Louis. There are others in the insurance report for the State of Missouri.
Q. Do you know of the National Life, of Tennessee?
A. I do.
Q. Doesn't that company do business in St. Louis?
A. That is industrial and accident; they sell with a small death benefit; it is not considered to be life insurance.
Q. Well, they pay insurance in case of death?
A. They do.
Q. Do you know of the National Life of U. S. A., of Chicago, Illinois?
A. I do; they have the same kind of a policy.
Q. That is a weekly premium policy, is it not?
A. Yes, sir; with 20 per cent of it applied to death benefit.
Q. Now, do you know any others similar in character to the ones I have mentioned?
A. The Missouri Life and Accident.
Q. Any others?
A. The Clover Leaf Casualty Company.
Q. Any more, Mr. Tatman?
A. I don't recall any more.
Q. I understood you to state that you had been with the Prudential Life Insurance Company more than ten years?
A. More than fifteen.
Q. Before you left?
A. Yes, sir.
Q. I understand you, Mr. Tatman, your answers are con-
18 fined to these so-called industrial companies?
A. Exactly.
Q. There are a great many other life insurance companies that represent ordinary insurance in the City of St. Louis?
A. Yes, sir.
Q. The Prudential writes ordinary life?
A. Yes, sir.
Q. And the Metropolitan?
A. Yes, sir.
Q. And the John Hancock?
A. Yes, sir.
Q. And a great many other companies?
A. Yes, sir.

Redirect examination.

By Mr. Bacon:

Q. These companies, the National Life of Tennessee, and the National Life and Accident of U. S. A., of Chicago, are companies that sell sick and accident life insurance, and there is a small benefit payable in case of a natural death?
A. Yes, sir.
Q. Now, Mr. Tatman, in regard to your services in the Prudential Life Insurance Company, did you have anything to do with the employment of agents or solicitors?
A. Yes, sir.
Q. Now, are the same qualifications required in the case of an industrial life solicitor and the ordinary life solicitor? For example, does a man who has the qualifications for a good solicitor of ordinary life make a good solicitor of industrial life, or vice versa?

Mr. Holliday: I think that is improper in form and I object to it for that reason, and, further, it is immaterial.
The Court: The objection to that is sustained.

19 Recross-examination.

By Mr. Holliday:

Q. Do you know of the Federal Casualty Company?
A. I don't know them; they are doing business around the state.
Q. Do you know the Continental Company?
A. I doubt if it has a natural death benefit.
Q. Do they do business here in the city?
A. Yes, sir.

ROBERT T. CHEEK, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in his own behalf, as follows:

Direct examination.

By Mr. Bacon:

Q. Please state your name.
A. Robert T. Cheek.
Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Where do you live?
A. No. 14 North Grand avenue, St. Louis.
Q. How long have you lived in St. Louis?
A. Since October, 1904.
Q. And during this time, what has been your business?
A. Insurance business; life insurance business.

Q. In that employment, what company, if any, were you connected with in December, 1911?

A. December, 1911, the first of December, 1911, I was with the Prudential Insurance Company of America.

Q. In the City of St. Louis?

A. Yes, sir.

Q. And under what superior officer?

A. The superintendent was C. A. Sullens.

Q. For what length of time, and in what capacity had you been in the service of the Prudential Life Insurance Company?

A. I was in the service of the Prudential from June 1,
20 1898, to December 1st, 1911.

Q. In what place, and in what capacity?

A. When I entered the service my home was in Pinckneyville, Illinois, and the office that I worked in was in East St. Louis. I worked from that office from June, 1898, to some time in 1899 or 1900, I am not sure which, when the district was divided and I was changed into a different district, to Belleville, Illinois, and I continued in the service from Belleville office until the first of December, 1902; then I was transferred from the Belleville district to Joplin, Missouri. I started work the first of January, 1903, in Joplin, and I worked until in October, 1904, in Joplin. Then I came to St. Louis and was with the Prudential from October, 1904, until December, 1911.

Q. Were you assistant superintendent in any office?

A. Yes, sir.

Q. Where?

A. I was assistant superintendent at Murphysboro, Illinois, from the East St. Louis office, and also was assistant superintendent at the time the district was divided, and I was changed into the Belleville district as assistant superintendent.

Q. I show you a letter and ask you if that is a letter you received from the company; just say yes, or no.

A. Yes, sir.

Mr. Bacon: I offer this letter in evidence, and ask that it be marked "Plaintiff's Exhibit A."

Said letter was marked by the stenographer "Plaintiff's Exhibit A," received in evidence and read to the jury, and is in the following words and figures, to wit:

21 PLAINTIFF'S EXHIBIT "A."

(Letter Head Prudential Insurance Company.)

June 8, 1908.

Mr. Robert T. Cheek, Asst. Supt.,
St. Louis #3, Ill.

DEAR SIR:

As your continuous service with the Prudential now covers a period of ten years, we take pleasure in sending, with this letter, certificate and silver badge of membership in Class "B" of the Prudential old guard.

Congratulating you upon the completion of your first decade of service with the Prudential, and with best wishes for the future,

I remain,

Very truly yours,

LESLIE D. WARD,
Vice-President.

Mr. Bacon:

Q. Have you any other business?

A. I haven't done any other kind of work since the first of June, 1898.

Q. Do you know anything about soliciting ordinary insurance?

A. I have never been very much of an ordinary insurance solicitor. Of course, the industrial agents always send all ordinary business they get to other men, and an industrial solicitor is primarily an industrial solicitor.

Q. In 1911, at the time of your leaving the Prudential Insurance Company of America, what had been your average earnings with this company?

22 A. Well, I judge, from $100 to $125 or $130; I have no record of it.

Q. A month?

A. Yes, sir; I have got no record; I kept no record; that is about my recollection about what it would be.

Q. State whether or not you voluntarily left the service of the company, or were discharged.

A. I resigned.

Q. When was that resignation?

A. Well, it was to be effective about the first week in December, 1911; I don't remember the date of the resignation, but it must have been written—my letter must have been written in November.

Q. After you left the service of the company, did you seek employment elsewhere?

A. Yes, sir.

Q. Did you find it?

A. I left the service of the Prudential to work for a stove company here in St. Louis; and after leaving I didn't go to work for the stove company. My work was to be in Texas and I didn't leave; I didn't leave the city; I never worked for the stove company at all.

Q. Did you try to go back to the insurance company?

A. Yes, sir.

Q. How soon after you left the service in December, 1911, did you try to return to the service?

A. Well, it was in the spring of 1912 some time; I don't remember the date, but it was in the spring of 1912. I met the assistant superintendent of the Prudential, a man by the name of Rodger Rodias, and he had learned that I didn't go to work for the stove company, and he asked me to come back, and I told him I would like to come back, and the rules of the Prudential, if a man has ever worked for the company——

23 Mr. Holliday: I would like to have the witness cautioned that he is only to testify to what he knows of his own knowledge.

The Court: Don't state what the rules of the company are.

Mr. Bacon:

Q. Well, as assistant superintendent, was it necessary for you to know the general customs and rules of the company in regard to what was done with those seeking employment?

A. Yes, sir.

Q. That is, as assistant superintendent, was it necessary for you to know what the requirements of the company were in regard to applicants for service?

A. Yes, sir.

Q. Now, continue with your answer.

A. Well, I couldn't make an application to the Prudential to go back to work for them after having been in the service without, first, the superintendent here writing and getting permission to take my application. That is what Mr. Rodias said he would do—write in and get permission to take my application.

Q. Did he do so, if you know?

A. I met Mr. Rodias soon afterwards, and he said——

Mr. Holliday (interrupting): I object to what he said.

The Court: The objection is sustained.

Mr. Bacon:

Q. Anyway, he said he would write in?

A. Yes, sir.

Q. Did you make any other application, make application to any one else, to any other agent of the Prudential—manager or superintendent?

A. Of the Prudential?

24 Q. Yes.

A. No, sir; Mr. Rodias is the only one I talked to about going to work.

Q. State whether or not you wrote any letters to the Prudential asking for employment.

A. I did.

Q. I will now show you a letter which I will ask to have marked "Plaintiff's Exhibit B," and ask you if that is a letter you wrote to the company?

A. Yes, sir.

Mr. Bacon: I offer this in evidence and desire to read it to the jury at this time.

Said letter, being marked "Plaintiff's Exhibit B," was received in evidence, read to the jury by counsel for plaintiff, and is in the following words and figures, to wit:

PLAINTIFF'S EXHIBIT "B."

St. Louis, Mo., 9/13th, '12.

Mr. F. F. Dryden,
President Prudential Ins. Company,
Newark, N. J.

DEAR SIR:

Will you be so kind and advise me why the Prudential Ins. Company refuses to employ me as agent?

I have twice through Ass't Sup't R. Rhodes of St. Louis # 2 Dis't applied for agency, the Company refusing to consider my application. I feel there must be some cause, and as I know of no reason why I should be refused, would thank you very much for this information.

Thanking you in advance
I am respectfully,

ROBERT T. CHEEK.

1400 N. Grand ave., St. Louis, Mo.

25 Mr. Bacon:

Q. Did you get an answer to that letter?

A. Yes, sir.

Q. Is this (showing a paper to the witness) the answer?

A. Yes, sir.

Mr. Bacon: I will have the stenographer mark this letter "Plaintiff's Exhibit C" and will read it to the jury in connection with the others.

Said letter, being marked "Plaintiff's Exhibit C," was received in evidence, read to the jury by counsel for plaintiff, and is in the following words and figures, to wit:

PLAINTIFF'S EXHIBIT "C."

(Letterhead of the Prudential Insurance Company.)

September 19, 1912.

Mr. Robert T. Cheek,
No. 1400 North Grand Avenue,
St. Louis, Mo.

DEAR SIR:

Responding to your letter of the 17th instant, concerning an Agency with this Company, we have to advise you that we have no vacancies at this time for which you could be considered.

I remain,

Very truly yours,

EDWIN F. KULP,
Supervisor.

E. F. K.

Mr. Bacon:

Q. Did you write any other letters than the one that has been offered in evidence?

A. I don't remember.

Q. Now, state whether or not, after receipt of this letter,
26 you made any application to any superintendent or manager of the Prudential Insurance Company of America for a letter.

A. For a letter of reference?

Q. Yes.

A. Yes, sir.

Q. To whom did you make such application?

Mr. Holliday: I wish to again at this time make my objection to any testimony in regard to a so-called letter of recommendation or letter of introduction under this section of the statute, on the grounds heretofore stated, to wit, that the statute does not give any right of action against this defendant and that it is unconstitutional—on all the grounds pointed out in the answer, and in my previous objection.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. Superintendent C. A. Sullens.

Mr. Bacon:

Q. When?

A. About the first of October, I think it was.

The Court:

Q. Superintendent of what?
A. Superintendent of the Prudential Insurance Company of America.

Mr. Bacon:

Q. In St. Louis?
A. Yes, sir; offices, 810 Olive street, on the fifth floor.
Q. What did he say?
A. He says, "I can't give you any letter of reference," he says, "You ought to know I can't give you a letter of reference; the company don't give letters; you worked for the company long enough to know they don't give any letters of reference."
Q. Did you ask for a letter of reference at any other time?
27 A. No, that was the only time I asked him for a letter of reference.
Q. Well, now, what efforts did you make to get employment in the City of St. Louis during the years 1911, 1912 and afterwards?
A. Well, I went to the Metropolitan; I tried to get a position with the Metropolitan.
Q. Who did you ask?
A. I asked Superintendent Burns of the Metropolitan, and I believe I asked Superintendent Funk, Walter Funk; I am not sure, but I think I asked him for a place.
Q. Did they give any reasons for not employing you?

Mr. Holliday: I object to this witness testifying about any conversations he had with these agents and officers of other companies.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. Well, they asked me if I had any experience, and I told them "some."

The Court: You were asked if they gave you any reasons for not employing you?

Mr. Bacon:

Q. Just state the reasons they gave if any.
A. They said they couldn't hire me in the City of St. Louis unless I have been away from the Prudential as much as two years.

Mr. Holliday: I will move to strike out that answer as being incompetent, irrelevant and immaterial to any issues in this case.
Mr. Bacon: The allegation is that he sought employment with various companies, and they said they would be glad to em-
28 ploy him, but they had a rule by which they couldn't employ him.

The Court: The question is whether or not you can prove it in that way.

Mr. Bacon: The only way you can prove it is by showing that he went there to ask for employment—did ask for employment, and he was refused employment, and giving their reasons for such refusal. That is the only way you can show it. He says they told him he ought to know they couldn't employ him according to their rule. But I don't care; I will withdraw that last question.

Q. Who was the first man you asked for employment?
A. I believe I went to Walter Funk first.
Q. What company was he manager for?
A. Superintendent of the Metropolitan.
Q. And where did you apply to him?
A. In his office at Grand and Olive.
Q. Is that the office of the Metropolitan, or one of the offices in the City of St. Louis?
A. Yes, sir.
Q. State whether or not he appeared to be in charge of the office.
A. Oh, yes.
Q. Or whether you knew he was superintendent.
A. Oh, yes; he was in charge of the office as superintendent.
Q. What reasons did he give you for not employing you?

Mr. Holliday: I object to that on the grounds heretofore urged to this line of testimony.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. What reasons did he give for not employing you?
29 A. He said he couldn't employ me on account of the agreement between the companies.
Q. What companies?
A. The Prudential and the——

Mr. Holiday (interrupting): I move to strike out the answer of the witness as being incompetent, immaterial and irrelevant, and not binding on the defendant in this case.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. What agreement; between what companies?
A. The agreement between the Metropolitan and the Prudential, that you couldn't go to work for one unless you had been away from the other for two years.

Q. State whether or not he said that was the only reason why he said he couldn't employ you?
A. Yes, sir.
Q. Now, who else did you apply to for employment in this industrial life insurance business?
A. Superintendent James Burns of the Metropolitan; the offices are at Park and Jefferson.
Q. State whether or not he refused to employ you?
A. Yes, sir.
Q. What reasons did he give, if any?

Mr. Holiday: I renew my objection to all this line of testimony as to the reasons given by Superintendents Funk, Burns or anybody else.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

30 A. He said he couldn't employ me unless I had been away from the Prudential as much as two years.

Mr. Bacon:

Q. Did you ever apply to the John Hancock?
A. Yes, sir.
Q. Where, and to whom?
A. Superintendent Daniel J. Blake, and his address was about 3929 Olive street at that time. His office was in what was known as beat No. 2.
Q. Did he employ you?
A. No, sir.
Q. Did he give any reasons for not employing you?
A. He said he couldn't on account of my not being away from the Prudential for two years.

Mr. Holliday: I move that that answer be stricken out, and object to it on the same grounds heretofore stated, incompetent, irrelevant and immaterial, and not binding on this defendant.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. Now Mr. Cheek, state, generally, what success you had in finding employment in other lines during the years 1911 and 1912. Did you find any employment, and if so, what?
A. Yes, I worked in 1912 and '13 for a sick and accident company.
Q. Now, what length of time did you work for them, if you know?

A. I worked for two; I don't know the dates, but the two covered about the two years that I had to be away from the Prudential Insurance Company. The two offices covered about the two years.

Q. Now, during those two years that you were away, 1912 and 1913, how much were you able to earn?

A. Well, I have no record of what I did earn but I don't
31 think I earned more than $40 or $50 a month; I doubt if it was that much.

Q. Who are you working for now?

A. The John Hancock Mutual Life, of Boston, Massachusetts.

Q. When did you get into their employ?

A. I went to them as soon as my two years was up; that is, I went to them the first, or last of December, 1913, and the superintendent told me that he wouldn't make a change in his staff during the month of January, but I could come back the first of February, and he thought he could place me, and I went back the first of February, and he put me to work.

The Court:

Q. The first of February of what year?

A. February, 1914.

Q. And you are working for them now, you say?

A. Yes, sir.

Mr. Bacon:

Q. Are you earning as much now as you did before?

A. I don't think so.

Mr. Holliday: I object to that as absolutely incompetent, irrelevant and immaterial in this case, as to what the witness has been earning since he went with the John Hancock.

The Witness: It is the same kind of work——

The Court (interrupting): Wait a minute, Mr. Witness; you have answered the question. The objection will be sustained as to that.

Cross-examination.

By Mr. Holliday:

Q. Mr. Cheek, when did you say you first went to work for the Prudential Insurance Company of America?

A. About the first of June, 1898.

Q. And you remained continuously in the employment of that company from that date until when?

A. About the first of December, 1911.

32 Q. You say you resigned from the Prudential?

A. Yes, sir.

Q. You weren't discharged?

A. No, sir.

Q. You resigned voluntarily?

A. Yes, sir.

Q. Did you write a letter to the company at that time, do you remember?

A. Yes, sir; I did.

Q. I show you a letter which I will ask the stenographer to mark for identification as "Defendant's Exhibit 1," and ask you whether that is the letter of resignation which you submitted?

A. Yes, sir.

Mr. Holliday: I offer this letter in evidence, and will read it to the jury in connection with his testimony, so it will all be more intelligible.

Said letter was marked by the stenographer "Defendant's Exhibit 1," was received and read in evidence, and is in the following words and figures to wit:

DEFENDANT'S EXHIBIT 1.

(Letterhead of the Prudential Insurance Company of America.)

In re Resignation.

Office of Company at St. Louis,
#3 Mo., Nov. 25th, 1911.

Mr. W. S. Decker, Div. Mgr.,
Neward, N. J.

DEAR SIR:

I herewith tender my resignation, effective Dec. 2nd, 1911. The cause of me resigning is I am offered another position,
33 whereby I believe I can better my condition.

Thanking the company for the many favors shown me in the past, I am,

Very resply.,

R. T. CHEEK,
Agt.

P. S.—Please acknowledge receipt of this communication.

R. T. CHEEK.

Mr. Holliday:

Q. This is on the letterhead of the Prudential Insurance Company of America, and is dated November 25, 1911; look at it and see.

A. Yes, sir; that is right.

Q. Did you receive an acknowledgment of that communication, do you remember?

A. Not until I was out of the service, I think about a month or two.

Q. I show you a carbon of a letter which I will ask the stenographer to mark for identification "Defendant's Exhibit 2," and ask

you if, as near as you can recall it, that is the letter, and about the time you received it; in other words, you understand, I haven't the original, and Mr. Bacon hasn't it here.

A. I have looked for that letter and I couldn't find it. Before I look at this letter I will tell you as near as I can how it read. It said, "Your resignation—in reply to yours of such and such a date, in view of your resignation, will say it inadvertently had been overlooked. We have communicated with our superintendent.

Q. Now, look at that letter and see if that is it.

Mr. Bacon: See if that is a carbon copy of the letter.

A. This evidently must be a carbon copy of the letter; I don't think I could word it exactly, but I had some recollection of
34 it, as I had correspondence with Mr. Sullens, the superintendent.

Q. That was signed by Mr. W. C. Decker, the general manager?

A. It says there, "In reply to my letter of the 25th"; I guess that is the one.

Q. And this letter, Defendant's Exhibit 1, is your resignation?

A. Yes, sir.

Mr. Holliday: I offer in evidence this carbon copy, which is marked "Defendant's Exhibit 2," to Mr. Cheek; we haven't the original here, and I will read it to the jury.

Said paper, marked "Defendant's Exhibit 2," was received in evidence, read to the jury by counsel for defendant, and is in the following words and figures, to wit:

DEFENDANT'S EXHIBIT 2.

Resignation. E. M.-M.

Dec. 18, 1911.

Mr. R. T. Cheek,
% Mr. C. A. Sullens, Supt.,
St. Louis, #3 Mo.

DEAR SIR:

Inadvertently your letter of November 25th, tendering your resignation, was not acknowledged. We, however, noted the contents and have communicated with Superintendent Sullens.

Regretting the oversight, I remain,
Very truly yours,

W. C. DECKER,
Division Manager.

Mr. Holliday:

Q. Now, you say in this letter of resignation, Mr. Cheek, that the cause of your resigning is that you were offered another
35 position whereby you believed you could better your condition?

A. Yes, sir.

Q. What was that position?
A. That was with the Neverbreak Range Company.
Q. Is that located here in the City of St. Louis?
A. Yes, sir.
Q. That is Mr. Culver's company?
A. Yes, sir.
Q. And Mr. Stoddard is also an officer of that company?
A. Yes, sir; I think he was sales manager.
Q. Had you been to see either Mr. Culver, the president, or Mr. Stoddard, the sales manager of that company, before you wrote that letter of resignation to the Prudential Insurance Company?
A. Yes, sir.
Q. Had you concluded all arrangements as to your employment before you went into the employ of the Never Break Range Company?
A. Yes, sir.
Q. What position were you to have with that company?
A. I was to collect and sell; the first work was to be collecting, and then selling stoves.
Q. Was your son employed by that company?
A. Yes, sir.
Q. Did you expect to make more working for that company than you were making with the Prudential?
A. I did, at the time; yes, sir.
Q. After you resigned from the Prudential Insurance Company of America, did you ever go to work for the Never Break Range Company?
A. No, sir.
Q. Why not?
A. Well, if you will let me make an explanation; I can't answer that question without making an explanation.

The Court: You were asked the reason.

Mr. Bacon:

Q. Go ahead and make any explanation you want.
A. My son came in from working in the territory, and he was dissatisfied; he didn't want to go out any more; I was to go
36 out with him. It was getting along about Christmas time when he went out, and he didn't get back until after the last of January or the first of February, and he didn't want to go back any more, and then I decided that I wouldn't go out either.

Mr. Holliday:

Q. That was voluntary on your part?
A. Yes, sir.
Q. In other words, your son was tired of traveling?
A. He was away from home all the time; never in one town more than two or three days at a time.
Q. And so he didn't want to keep up that kind of work?

A. No, sir.
Q. And you didn't want to go out?
A. I didn't start.
Q. So far as you know, would Mr. Stoddard still have employed you if you wanted to go with them?
A. So far as I know; yes.
Q. When was it you made up your mind that you didn't want to go with the Never Break Range Company?
A. After my son came home the last time, about the first of February, 1912.
Q. Had you obtained any other employment meanwhile?
A. I had started, while I was waiting for him, to sell some sick and accident insurance, while I was waiting for him to come in, but he didn't come in for the holidays.
Q. About when did you start selling this insurance?
A. Oh, I don't know; it must have been about the latter part of December; I judge it was in December, 1911, or the first part of January, 1912.
Q. Now, for what company were you selling that insurance?
A. For the Continental Casualty Company of Chicago.
37 Q. Did that company have an office here in the City of St. Louis?
A. Yes, sir.
Q. And you worked in the St. Louis office?
A. Yes, sir.
Q. Was that a life and accident company?
A. It was sick and accident.
Q. Well, didn't it have a life policy?
A. Yes, sir; of course they had a life policy, accidental death, but there was no natural death benefits, if I remember right, in that company.
Q. How long did you continue to work for that company?
A. I worked for the Continental Casualty Company until the manager that I was working for left the Continental, and went to the National of U. S. A.

The Court:

Q. How long was that?
A. I don't remember just what time that was.
Q. About how long?
A. I judge it was about six or eight months, maybe more; I can't tell. I worked for the two companies combined about two years.

Mr. Holliday:

Q. After you left that company and went with the other one some time in 1912, how long did you continue to work for that second company?
A. I worked for the National of U. S. A. until my two years was up so I could get back into the life insurance business again.

Q. I believe you testified that you went to the John Hancock February 1, 1914?

A. About the 10th, I believe, or the 11th; around the first of February some time.

Q. What was this second company that you worked for?

A. The National of U. S. A., of Chicago.

Q. Was that company doing business in the City of St. Louis?

A. Yes, sir.

38 Q. What kind of business did it do?

A. Well, they have a life and accident business on the ordinary plan, and a sick and accident on the monthly plan, and I believe they sold a weekly policy, but I never sold any of the weekly policies; I believe they had a weekly branch for sick and accident.

Q. Did you hand this letter of resignation, Defendant's Exhibit 1, to Mr. Sullens?

A. If I remember right I mailed one to the company, and handed Mr. Sullens one.

Q. Did Mr. Sullens have any talk with you when he received your resignation?

A. He did.

Q. State whether or not he tried to persuade you to stay with the Prudential Insurance Company of America.

A. He asked me to stay.

Q. And you declined?

A. Yes, sir.

Q. Now, when was it that you first met Mr. Rodias on the street and had this talk about coming back to work for the Prudential?

A. I can't tell you the date; it was in the spring, though, of 1912.

Q. Well, was it in May?

A. Might have been May; might have been April; I don't remember any of the dates.

Q. That was when you had your first talk with him?

A. Yes, sir.

Q. When did you have your second talk with him?

A. We talked about twice or three times, about two or three times altogether. We had to wait quite a while before I could do anything after I had seen him the first time, and then the second time after I had seen him he told me that he couldn't do anything for me. He said that if he was me he would write to the president; he says, "You know him," and he says, "You write to him

39 and ask him why;" and that is what I did.

Q. That was this letter of September 13, 1912. Now, when was it that you went to Mr. Sullens and asked him for this letter?

A. About the first of October, I think it was, of 1912.

Q. That was the first and only time you asked him for this letter, was it?

A. Yes, sir; I don't remember asking him but once.

Q. Now, didn't Mr. Sullens tell you that he couldn't give you a letter, but that you would have to take it up with the company?

A. He told me I could refer any one to the company. He says, "You just refer—any place you find a position you just refer them to the company," but he couldn't give me a letter.

Q. Now, during the year 1913, did you work for the Bankers Reserve Company?

A. No, sir; I don't think I ever done any business for them; I think it was about 1913 that Mr. Baker wanted me to work for the Bankers Reserve; he spoke to me about working for them.

Q. What time in 1913 was that?

A. I don't remember.

Q. Well, was it early in the year?

A. I think so; I don't remember.

Q. You decided you didn't want to go with the Bankers Reserve?

A. I didn't think I could sell ordinary life insurance alone; they didn't sell anything but the ordinary branch policy.

Q. Did you place any business for the Bankers Reserve Company during the year 1913?

A. I don't remember of ever writing an application for them; if I did I don't remember it.

Q. Did you ever do—what I am trying to get at is whether you and Mr. Baker of the Bankers Reserve, in 1913, did any business together?

A. I didn't sell any insurance that I remember of; I don't remember of selling any.

Q. Do you remember ever getting any commissions from them?

A. I do not.

Q. Now, when you were having these negotiations with Mr. Culver and Mr. Stowward of the Never Break Range Company, you felt that you would be competent to hold down that job they were offering you, didn't you?

A. Yes, sir; I suppose I did.

Q. When was it that you went to see Superintendent Funk, if you remember, Mr. Cheek?

A. In the first half of 1912; I don't remember the months.

Q. Well, was it before or after you saw Mr. Rodias of the Prudential?

A. It was after, I believe; I am not sure about that, though.

Q. And when was it that you went to see Mr. Burns?

A. I went to see Mr. Burns, if I remember right—I went after seeing Mr. Funk.

Q. When was it that you went to see Superintendent Blake of the John Hancock?

A. That was the summer of 1912, but I don't remember the month; I judge it was July or August; I am not sure about the dates, but it was that same summer.

Q. Were you sick at all during the years 1912 or 1913?

A. Sick?

Q. Yes.

A. No, sir; not that I remember of.

Q. Now, when you were employed by the Prudential Insurance Company of America, your contract of employment with the Pru-

dential covered not only industrial insurance, but ordinary insurance?

A. Yes, sir.

Q. Did you solicit ordinary insurance?

A. Yes, sir.

41 Q. Did you write any of it?

A. Some; it was industrial, but the industrial men, of course, had authority to write ordinary, but they had to write the industrial because it was an industrial office.

Q. Wasn't it true at that time, Mr. Cheek, that all the agents, whether they were in an industrial office or not, were supposed to write both kinds of insurance?

A. All the industrial agents were supposed to write both kinds.

Q. You had what was called an allotment of ordinary insurance, did you not?

A. Yes, sir.

Q. That is, a certain amount of straight life insurance that you were supposed to get?

A. Yes, sir.

Q. Did you get your lot?

A. No, sir; I don't think I ever got my allotment in the ordinary branch.

Q. But you did write some of it?

A. Yes, sir.

Q. And received commissions for doing it?

A. Yes, sir.

Q. I will ask you, Mr. Cheek, whether you remember that during the year 1911, being the last year you were with the Prudential, your average weekly earnings amounted $20.66 a week?

A. I have already answered that; that I didn't know just how much I made; that I had no record of it.

Q. Would you say whether or not that is approximately correct?

A. Of course, the company has got a record of it; I am sure that the company has a record of it, of what I earned.

Q. Well, if the records of the company shows that your average weekly earnings for the year 1911, were $20.66, would you say that was correct?

A. I am not trying to dispute the company's record.

Q. You had no dispute with the company when you left

42 their services?

A. No, sir; I never did have one with them.

Redirect examination.

By Mr. Bacon:

Q. What share, or what proportion of the business you wrote was there between ordinary life and industrial life; what proportion of your earnings came from industrial business, and what proportion came from ordinary business?

A. Most of it, I guess three-fourths of it, would come from the industrial, or maybe four-fifths.

Recross-examination.

By Mr. Holliday:

Q. Have you, in your testimony here today, told all the efforts that you made to secure employment after the first of January, 1911?
A. If I remember; I remember of no others; I might have applied to some other place, but I don't remember it now if I did.

Mr. Bacon:

Q. Did you continually try to get employment when you didn't have any?
A. I continually tried during the year 1912 until late in the year, when I found it was no use for me to go any further.

Mr. Holliday:

Q. I understand you to testify that you were working during the year 1912?
A. I was in the sick and accident line, and I was very much dissatisfied with it; I couldn't make the money there I had before.

43 WALTER FUNK, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified on the part of the plaintiff as follows:

Direct examination.

By Mr. Bacon:

Q. Please state your name.
A. Walter Funk.
Q. Your business.
A. Insurance.
Q. Your present business.
A. I am not employed.
Q. You live in St. Louis?
A. I do.
Q. State whether or not you were ever in the employ of the Metropolitan Life Insurance Company?
A. I was.
Q. In what capacity?
A. During the time I was with them I was agent, assistant superintendent and district manager.
Q. In St. Louis?
A. I was in St. Louis since January, 1903, until October, 1915.
Q. Now, what length of time in all were you with the Metropolitan, either as agent, assistant superintendent or manager?

A. Twenty-one years.
Q. Twenty-one years with them?
A. Yes, sir; with them.
Q. State whether or not in the year 1912 you were connected with the Metropolitan, and if so, in what capacity.
A. Yes, sir; I was superintendent for them.
Q. State whether or not during that year Mr. Cheek made application to you for employment?
A. Yes, sir; Mr. Cheek made application to me for employment; I wouldn't state the year, but I think it was—must have been in 1912.
Q. Did you give it to him?
44 A. I did not.
Q. Why?

Mr Holliday: I object to that for the reasons heretofore stated; irrelevant, incompetent and immaterial, and not binding on us.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. Go ahead.
A. I couldn't employ him.
Q. Why?

Mr. Holliday: I object to that for the same reasons.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

A. Because of the fact of his having left another life insurance company in the city.

Mr. Bacon:

Q. You say it was because he had left the services of another life insurance company?
A. Yes, sir.
Q. To what extent did that prevent his obtaining employment with you?
A. I couldn't employ him for two years.
Q. Any one leaving the service of another company?
A. Some companies.
Q. What companies?

Mr. Holliday: I object to that on the grounds heretofore stated; not binding on us; incompetent, irrelevant and immaterial.
The Court: The objection is overruled.

Mr. Bacon:

45 Q. Just state what the reason was for your not employing him, and by what companies that same agreement existed, between whom?

Mr. Holliday: I object to that question for the same reasons as heretofore urged.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

A. Well, it was generally understood that the manager wasn't allowed to employ a man who left either the Prudential Insurance Company of America or the John Hancock, or the Metropolitan; the superintendents weren't allowed to employ any one that had left any one of these other companies; they understood that, and they didn't do it.

Mr. Holliday: I move that that be stricken out for the reason that it is incompetent, irrelevant and immaterial; not binding on us, and for the further reason that it is our contention that to permit recovery on this ground would deprive our company or any other company of the right to employ such men as it saw fit in its service; would be to deprive them their liberty to contract and their right to property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Court: The objection and motion are overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. How was it understood; who were you instructed by——

Mr. Holliday (interrupting): I would like to have the
46 record here show that I am renewing my objection to all this line of testimony.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

The Witness: You mean how we got that information?

Mr. Bacon:

Q. Yes, sir; who was it that communicated this information to you, and how did you act upon it?

A. It was generally understood to be the attitude of the company's officers towards any agent leaving the service of another company.

Q. Did you have instructions to employ any one?

A. The instructions to us are supposed to come in a very peculiar way.

Q. How?

A. They were understood.

Q. How; from talks with the officers?

A. They didn't write written instructions to that effect, or anything like that, or lay down any such rules for management; they didn't do that, but from our understanding of their attitude we knew better than to submit the name of an agent leaving the service of another company; we knew better than that. I offered Mr. Cheek employment, but not in the City of St. Louis. I offered Mr. Cheek employment in the county, out at St. Charles, Missouri, and at that time Mr. Cheek said he didn't care to leave the city and go out into the county.

Q. State whether or not you would have employed him if it hadn't been for that agreement——

Mr. Holliday (interrupting): I object to that as incompetent, irrelevant and immaterial, and not binding on us, and calling for a conclusion of the witness.

47 The Court: The objection will be overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. I surely would.

Mr. Bacon:

Q. State whether or not the John Hancock Mutual Life Insurance Company, the Prudential Insurance Company of America and the Metropolitan Life Insurance Company, all of this city, acted upon the same understanding and agreement that they wouldn't employ any men leaving the service of either one of these companies for a period of two years.

Mr. Holliday: I wish to renew my objection on the same grounds as heretofore stated.

The Court: Same ruling.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

(Previous question read by the reporter.)

A. That was always my understanding as manager for the company.

Mr. Bacon:

Q. Can you state generally what the volume of business done by these three companies, the prudential, Metropolitan and John Hancock, in the industrial line compares or how it compares to the volume of business done by an other of the competing companies in the same line, in St. Louis?

A. Not in dollars and cents.
Q. But generally?
A. In a general way I could, yes.
Q. What is it?
A. The Metropolitan, the Prudential and the John Hancock do practically all the industrial business that is done in this city.

Mr. Bacon: Take the witness.

48 Cross-examination.

By Mr. Holliday:

Q. Mr. Funk, what do you mean by practically all?
A. Those others do a little of that line of business but they are not serious competitors at all; they really do very little business.
Q. How many other companies are there engaged in that sort of insurance business around town, here in the city?
A. I don't know; that don't concern me, because we have no interest in them; they really don't compete with these three companies.
Q. You mean to sit there and tell the jury that you were twenty-one years in the employ of the Metropolitan Life Insurance Company and don't know what other life insurance companies are doing business here in the City of St. Louis?
A. Yes, sir; for the reason that we have no interest in them, in looking after their business; they don't affect us in any way, and what doesn't affect us I don't have any interest in looking them up.
Q. You say you offered Mr. Cheek employment?
A. I did.
Q. In St. Louis County?
A. In the county, or St. Charles.
Q. As agent for the Metropolitan?
A. Yes, sir.
Q. And he declined it?
A. He said he didn't care to go out into the county, as he would have to move his family out there.
Q. When did you leave the service of the company?
A. October 30, 1915.

49 JOSEPH W. MCKINNEY, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on the part of the plaintiff as follows:

Direct examination.

By Mr. Bacon:

Q. Please state your name.
A. Joseph W. McKinney.
Q. You live in the City of St. Louis?
A. Yes, sir.

Q. What is your business?
A. My business is in the grocery and butcher business.
Q. Have you ever been in the life insurance business?
A. Yes, sir.
Q. When?
A. Well, I worked for the Prudential; I believe I went with them in September, 1911, and I resigned in 1912, around May or June, as well as I remember it.
Q. Do you know Mr. Cheek, the plaintiff?
A. Yes sir.
Q. State whether or not you know anything about his asking Mr. Sullens of the Prudential Insurance Company of America for a letter such as the statute provides, stating his length of service, and so forth?
A. I do.
Q. Well, were you with him when he made that request?
A. Yes, sir.
Q. Of whom did he make it?
A. To Mr. Sullens, C. A.
Q. What was Mr. Sullens' connection with the Prudential?
A. He was superintendent in district No. 3.

Mr. Holliday: In order to keep my record clear, I would like to renew my objection to any testimony about this letter on the
50 grounds heretofore stated, including, of course, that relating to the constitution.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. Now, what occurred on that occasion, Mr. McKinney, as near as you can remember?
A. Why, he told him, as well as I remember now, that it was against the practice of the company, or the rules of the company, and for that reason he couldn't give it to him. He told him that he might ask the company for one, but he (meaning Sullens) couldn't do it himself.
Q. Did you ever ask the company, yourself, for a letter——

Mr. Holliday (interrupting): I object to that question; we are trying Mr. Cheek's case here today, as I understand it.
The Court: There is only one indictment in this case.
Mr. Bacon: I simply wanted to lay a foundation to introduce this letter, and if Mr. Holliday will let this letter come in I have nothing further to ask.

Cross-examination.

By Mr. Holliday:

Q. When was this visit that you and Mr. Cheek paid to Mr. Sullens?

A. I don't believe I can recall the date, but it was around the latter—early part of October, 1912, as *a* remember of it.

Q. It was after he left the service of the Prudential?

A. Yes, sir.

51 DANIEL J. BLAKE, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified on the part of the plaintiff as follows:

Direct examination.

By Mr. Bacon:

Q. Will you please state your name?

A. Daniel J. Blake.

Q. Your business?

A. Life insurance.

Q. What company are you connected with?

A. The John Hancock Mutual Life.

Q. In what capacity are you connected; what position do you hold?

A. Superintendent.

Q. State whether or not you know Robert T. Cheek, the plaintiff in this case?

A. I met Mr. Cheek just once; I wouldn't know him if I met him on the street today; that is some four or five years ago.

Q. This is Mr. Cheek right here?

A. Yes, sir; I recognize him now.

Q. Do you remember of his ever applying to you for employment?

A. Yes, sir.

Q. When?

A. Well, some years ago; probably four or five years ago; I don't remember exactly the date.

Q. You don't remember the exact time?

A. No, sir.

Q. Four or five years ago?

A. I should judge so.

Q. Did you employ him?

A. No, sir.

Q. Why?

Mr. Holliday: I wish to renew my objection to this, on the same grounds heretofore urged to this line of examination.

The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

52 Mr. Bacon:

Q. Why didn't you employ him?
A. I don't remember that exactly; many men call and we don't employ them; I don't recall just the incident.
Q. Now, state whether or not your company will employ a man who leaves the services of the Metropolitan or the Prudential within a period of two years after leaving such employment?

Mr. Holliday: I renew my objection to that again, and to all similar questions, as incompetent, irrelevant and immaterial and not binding on us.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

A. I didn't get your question.

(Previous question read by the reporter.)

A. I can't answer that question.

Mr. Bacon:

Q. Whether your company——
A. (Interrupting): I can't answer for the company.
Q. To what extent could you answer it, so far as your office is concerned?
A. I have no instructions on that from the home office, from my company.
Q. Well, if Mr. Cheek had applied to you for employment within six months after leaving the service of the Prudential, could you, or would you have employed him, if otherwise acceptable?
A. I would say this on that: It is generally understood that it is not advisable to employ other men shortly from other companies.
Q. That is, a man leaving the service of either the Prudential, the Metropolitan or the John Hancock, in the industrial department, wouldn't be employed by either of the other companies for a period of two years?

53 Mr. Holliday: I object to that question; the witness hasn't answered that way.
Mr. Bacon: I asked him if that was not a fact. It is an embarrassing position to put Mr. Blake in; I admit that, but I want to get the facts to the best of his knowledge.
The Court: Let's hear your question again.

(Previous question read by the reporter.)

The Court:

Q. Can you answer that question?
A. I can't very well answer that question.

Mr. Bacon:

Q. You can't answer it?

A. Not in that form.

Q. What is the understanding between those companies if there is one, in regard to employing a man who leaves the employment of either of the others.

A. Well, there might be an understanding; it is generally understood amongst the men in the field that a man leaving any other of those companies can not work for the others in the same cities for a certain period; that is amongst the men.

Q. For a period of two years?

A. Yes, sir; that is amongst the agents in the field.

Q. Is that the understanding amongst the managers, too?

A. They have talked it over different times, but I have yet to find a man who has had any written instructions on that.

Q. But it is generally understood?

A. Maybe.

Q. That is, the understanding between the various officers of these three companies, that if a man leaves the service of one, he must wait two years before any of the others will employ him; that is a fact, isn't it?

A. I don't like to answer that question in that form, because I know nothing about the other companies.

54 Q. But so far as your company is concerned, what about that?

A. I don't know as I know two superintendents of the other companies personally; you don't have any close connection with them. I know just about my own office.

Q. Well, as far as your office is concerned, state whether or not if a man is otherwise suitable as an industrial insurance agent, coming from any one of these other companies, would you employ him within a period of two years.

A. Well, I might answer that question in this way, that our company gives you, as superintendent, discretionary powers in submitting applications, and I am held responsible in choosing men who are applicants who are best fitted for the position. In case we accept an application it is sent to the home office, and they are the ones that says whether he shall be employed, and not me.

Q. Do you know of any man being employed by your company within a period of two years after leaving the service of another company engaged in the industrial insurance business?

A. I don't recall any; no.

Cross-examination.

By Mr. Holliday:

Q. Mr. Blake, I understood you to say that it is not advisable for one company to employ an agent from another company. Why is it not advisable?

A. Well, I believe this: We feel that it is better for the policy holders, and better for the companies.

Q. Will you explain that to the Court and jury?

A. It is our experience in this industrial insurance business, that it is not advisable for one company to take a man who has had a position with another company.

55 Mr. Bacon: I object to that as incompetent, irrelevant and immaterial; the question is, did they make an unlawful agreement; it is not a question whether it is advisable; of course, it is advisable to make any kind of a pooling agreement, but I submit this is not proper cross-examination.

The Court: The question is whether or not it is unlawful; isn't that wrapped up in the question whether or not it is advisable?

Mr. Bacon: I understand that the opinion of the Supreme Court says that any agreement of that sort in itself is unlawful. I understand that is what the Supreme Court decided.

The Court: I think he may answer the question.

Mr. Holliday: He has answered it. I will ask this further question:

Q. So, in your opinion, it is not advisable for one of these companies engaged in industrial life insurance to take a man from the employment of another company engaged in the same business in the same city?

A. You want my personal opinion?

Q. Yes.

A. If that practice were followed out, if the other companies encouraged the taking of men away from other companies in the same city, they would have a tendency to go amongst the clients that they had placed with the other companies and try and transfer them into a new company that they were engaged with. That is the principal reason why most superintendents feel that it would not be advisable to employ agents from other companies; that is, those large companies.

Q. Well, state whether or not that would be harmful to the
56 policy-holders, if a man came around and tried to persuade him to cancel the insurance he had, and take out other insurance?

Mr. Bacon: I object to that as calling for the conclusion of the witness, as to what is advisable for the policy-holders; that is not proper cross-examination to ask for his opinion.

The Court: He is asking for a further reason as to why he says it is not advisable. He may answer the question.

A. I believe there would be a chance to injure policy-holders by transferring their policies from one company to another.

Redirect examination.

By Mr. Bacon:

Q. Insurance agents very frequently solicit one to drop one kind of insurance, drop policies in one company and take policies in another company, don't they?
A. It is against the ethics of the business to do that.
Q. Oh, yes, but they still do that?
A. No good company encourages that.
Q. But it is done, isn't it?
A. I presume so, to some extent.
Q. Now, isn't it to the advantage of a policy-holder, if he can improve his protection, get a better policy, to drop one policy and get a better one?
A. I would answer that question "yes."
Q. And isn't it the duty of an agent, if he finds that a man has an insurance policy that is not suitable to his needs to try and induce a man to switch; isn't it his duty to advise the man to switch?
A. Yes, sir.

57 Recross-examination.

By Mr. Holliday:

Q. On what are the rates of insurance based—on a man's age, or not?

Mr. Bacon: I object to that as being entirely immaterial to the issues in this case.
The Court: I don't see any materiality in that. We don't want to go into the whole question of life insurance in this case.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

At this point the Court, having first duly admonished the jurors touching their proper conduct while court should not be in session, declared a recess until the hour of 2 o'clock p. m. of the same day, at which hour the respective parties being present, court was duly reconvened, and further proceedings were had in the case at bar as follows:

PHILIP BECKER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on the part of the plaintiff as follows:

Direct examination.

By Mr. Bacon:

Q. Will you please state your name?
A. Philip Becker.

Q. You are a resident of St. Louis?
A. My home is in Pulaski County, on Big Pine Reserve; my post office address is Hooker, Missouri.
Q. You have business in St. Louis?
A. Yes, sir.
Q. For how long a time have you been in business in St. Louis?
A. Since 1880.
58 Q. What line of business are you in at the present time?
A. Manager of the Bankers Reserve Company and I own a retail grocery, meats, fruits, vegetables and so forth.
Q. Will you state whether or not you have ever been connected with the Prudential Insurance Company of America?
A. I was.
Q. What capacity?
A. Agent, assistant superintendent and superintendent of agents.
Q. For how long a time?
A. Over nineteen years.
Q. State whether or not you know of any understanding or agreement on the part of the Prudential Insurance Company of America, the defendant in this action; the Metropolitan Mutual Insurance Company and the John Hancock Insurance Company as to the employment of any person who has left the service of either by the other.
A. I do.

Mr. Holliday: I object to this question and all similar questions, which I assume are going to be put to this witness, on the ground that that testimony is incompetent, irrelevant and immaterial to the issues in this case, and not binding upon this defendant, and for the other reasons heretofore urged to similar questions.
The Court: The objection is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Mr. Bacon:

Q. What is it?
A. The agreement was in the early days unlimited; that if an employe left one company that he was barred from service within that same city for all time. Later on it was reduced to the limit of two years.

59 Mr. Holliday: I ask that the answer of the witness be stricken out as not confined to the issues in this case, and as being incompetent, irrelevant and immaterial testimony.
The Court: The motion to strike out is overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted.

Cross-examination.

By Mr. Holliday:

Q. Do you know Mr. Cheek, who has testified?
A. Yes, sir.
Q. Did he ever, in the years 1912 or '13, do any business for your company, the Bankers' Reserve?
A. No, sir.
Q. You never employed him?
A. No, sir.
Q. Did he ever seek employment with you?
A. Not that I know of; no, sir.

At this point the plaintiff rested his case in chief.

Whereupon the defendant submitted to the Court in writing and requested the Court to give and read to the jury, instructions in the nature of a demurrer, in the following words and figures, to wit:

"The Court instructs the jury that under the pleadings and evidence offered for the plaintiff, their verdict on the first count of plaintiff's petition must be in favor of the defendant."

"The Court instructs the jury that under the pleadings and evidence offered for the plaintiff, their verdict must be in favor of the defendant on the second count of the plaintiff's petition."

"The Court instructs the jury that under the pleadings and all the evidence in the case, their verdict on the first count of plaintiff's petition must be in favor of the defendant."

60 "The Court instructs the jury that under the pleadings and all the evidence in the case, their verdict must be in favor of the defendant on the second count of the plaintiff's petition."

Which said instructions the Court, upon a consideration thereof, refused to give and read to the jury at the request of defendant.

To which action of the Court in so refusing to give and read said instructions, defendant, by counsel, then and there duly excepted.

The Court: You may proceed, Mr. Holliday.

Mr. Holliday: We elect to stand on the plaintiff's case, if the Court please; we have no testimony to offer.

And the above and foregoing was all the evidence offered, introduced or heard in the trial of the above-entitled cause.

Whereupon the plaintiff submitted to the court in writing and requested the Court to give and read to the jury instructions in the words and figures as follows, to wit:

Plaintiff's Given Instructions.

The Court instructs the jury that under the first count of plaintiff's petition he seeks to recover damages from the defendant on account of the refusal of defendant to give him a letter of dismissal upon leaving its employment, such as required by the statute of this state. This statute provides that whenever an employe of any corporation doing business in this state shall be discharged, or voluntarily quit the service of said corporation, it shall
61 be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent, or manager, setting forth the nature and character of service rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service. If the jury find from the evidence that plaintiff on or about the 3rd day of October, 1912, had been in the service of defendant for a period exceeding ninety days, and that defendant was then and had been for one or more years before that time a corporation doing business in this state, and that plaintiff having quit the service of defendant demanded a letter from the superintendent of the defendant company in the City of St. Louis, setting forth the nature and character of the services rendered by plaintiff to such corporation, and the duration thereof, and truly stating for what cause plaintiff had quit said service and defendant, through its said manager in the City of St. Louis, refused to give any such letter, then plaintiff is entitled to recover in this action such actual damages as you may find he has sustained by reason of such refusal, not exceeding the sum of two thousand dollars, and if the jury further find from the evidence that such refusal on the part of said defendant, through its manager, was a willful violation of said statute, then the jury may, in addition to such actual damages as they believe from the evidence plaintiff has sustained because of said refusal, allow punitive dam-
62 ages in such amount as the jury may believe from the evidence should be awarded, not exceeding the sum of three thousand dollars. The jury will state separately the amount of actual damage, if any, they find the plaintiff has sustained and such amount, if any, as the jury may award for punitive or exemplary damages.

The Court instructs the jury that in the second count of plaintiff's petition he seeks to recover damages because of his inability to find employment in the City of St. Louis as a solicitor of industrial insurance because of an unlawful agreement between the defendant and two other life insurance companies doing an industrial business in the City of St. Louis not to employ any employe leaving the service of any other one of the three companies for a period of two years from the time of his leaving the employ of such other company, or being discharged by it. If the jury find from the evidence that there was such an agreement between defendant and the Met-

ropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company, if you find from the evidence that such an agreement existed, was unable to obtain employment with either of said companies or in a similar business, and sustained losses of wages or earnings, that he might have earned in the line of soliciting industrial insurance, had it not been for such unlawful agreement of said companies, then in such case he is entitled to recover of defendant such damages as he may have sustained because of his inability to find employment because of said unlawful combination, or agreement, not exceeding the amount of three thousand dollars, and if the jury further find from the evidence that damage was sustained by plaintiff because of said combination as aforesaid then they may award plaintiff punitive or exemplary damages to
63 such an amount as to the jury may seem right, not exceeding the sum of five thousand dollars, in addition to the actual damages sustained by plaintiff, if the jury find from the evidence that he has sustained such damage. The jury will find the amount of actual damage, if any, and the amount of punitive or exemplary damages, if any, separately.

The Court instructs the jury that punitive or exemplary damages are those which the law allows the jury to award an injured person in addition to actual damages sustained by him by way of punishing a defendant for a willful, wanton or oppressive act in violation of statute or of right, by way of setting an example and punishing the offender. It is within the discretion of the jury as to whether or not punitive damages shall be allowed.

Which said instructions were given by the Court.

To which action of the Court in giving and reading said instructions to the jury, at the request of plaintiff, defendant, by counsel, then and there duly excepted.

Whereupon the Court, of its own motion, gave and read to the jury an instruction in the following words and figures, to wit:

Court's Instruction.

The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agrees upon a verdict, the same should be returned as the verdict of the jury; in which event all of the jurors who concur in such verdict shall sign the same. If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

64 Whereupon defendant submitted to the Court, in writing, and requested the Court to give and read to the jury instructions in the words and figures following:

Defendant's Refused Instructions.

The Court declares the law to be that the plaintiff is not entitled to recover on the first count of said petition, because said count of said petition is based upon Section 3020 of Revised Statutes of

Missouri, 1909, and said statute is unconstitutional in that it is discriminatory and is class legislation and infringes on the right of free speech, all in violation of Section 14 of Article II, and section 30 of Article II, and Section 53 of Article IV of the Constitution of Missouri, and that said statute is likewise unconstitutional in that it attempts to deprive the defendant of its property without due process of law in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

The Court declares the law to be that the plaintiff is not entitled to recover on the second count of said petition for the reason that to deprive the defendant of its right to determine what person or persons it will employ is to deprive the defendant of its property and right to contract without due process of law, in violation of Section 1, Article XIV, of the Amendments of the Constitution of the United States.

The Court instructs the jury that the plaintiff is not entitled to punitive damages under the first count of plaintiff's petition.

The Court instructs the jury that the plaintiff is not en-
65 titled to punitive damages under the second count of the plaintiff's petition.

Which said instructions the Court, upon a consideration thereof, refused to give and read to the jury at the request of defendant.

To which action of the Court in so refusing to give and read said instructions defendant, by counsel, then and there duly excepted.

Thereupon, on the said 8th day of October, A. D. 1917, the jury, having heard the evidence and the arguments of counsel, and being advised of the law by the instructions of the Court, retired to the jury room to consider of their verdict in said cause.

And thereafter, on said same 8th day of October, A. D. 1917, the jury returned into said court, in writing, their verdict in favor of the plaintiff and against the defendant in the sum of fifteen hundred dollars; which said verdict (omitting the formal caption) is in the following words and figures, to wit:

Verdict.

We, the jury in the above-entitled cause, do find in favor of the plaintiff on the first count of plaintiff's petition, and we assess his actual damages at the sum of two hundred dollars damages. And we further assess his punitive damages at the sum of four hundred dollars. And we further find in favor of the plaintiff on the second count of plaintiff's petition, and we assess plaintiff's actual damages at the sum of three hundred dollars, and we further assess his punitive damages at the sum of six hundred dollars.

Which said verdict the Court received from said jury, and
66 the same was on said same 8th day of October, A. D. 1917, filed in said court in said cause, and on said same 8th day of October, A. D. 1917, the Court duly entered of record, in accordance with said verdict, its judgment against the defendant and in favor of the plaintiff, in the sum of fifteen hundred dollars.

To which action of the Court in so receiving and filing the said

verdict, and to the rendering of said judgment thereon, the defendant, by counsel, at the time duly objected and excepted, and still continues to object and except.

And thereafter, at said October Term, A. D. 1917, of said court, and within four days after the rendition of said verdict, and on, to wit, the 10th day of October, A. D. 1917, the defendant duly filed in said court in said cause in writing its motion for a new trial, which said motion (omitting the formal caption) is in the words and figures following:

Motion for New Trial.

Comes now the defendant in the above-entitled cause and moves the Court to set aside the verdict of the jury and the judgment of the Court heretofore rendered herein and grant defendant a new trial for the following reasons, to wit:

First. Because said verdict is against the law and the evidence.

Second. Because the Court erred in overruling the objections to the introduction of any evidence under either count of plaintiff's petition made by the defendant at the opening of the case.

Third. Because the Court erred in refusing to sustain the
67 demurrer to the evidence under the first count of plaintiff's petition offered at the close of plaintiff's case.

Fourth. Because the Court erred in refusing to sustain the demurrer to the evidence under the second count of plaintiff's petition offered at the close of plaintiff's case.

Fifth. Because the Court erred in refusing all of the instructions and declarations of law requested by defendant.

Sixth. Because the Court erred in admitting incompetent evidence for the plaintiff over defendant's objection.

Seventh. Because the Court erred in excluding competent evidence offered for the defendant on plaintiff's objection.

Eighth. Because the Court erred in giving the instructions for the plaintiff.

Ninth. Because the Court erred in overruling the defendant's objection that Section 3020, R. S. of Missouri, 1909, was unconstitutional and void in the following respects, to wit, viz:

That said statute is discriminatory and constituted class legislation and infringed on the right of free speech in violation of Section 14, Article II, of Section 30 of Article II, of Section 53 of Article IV, of the Constitution of Missouri.

Tenth. Because the Court erred in overruling the defendant's objection that said Section 3020, R. S. of Missouri, 1909, was uncon-

stitutional in that it attempts to deprive the defendant of its property and right of contract without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States.

68 Eleventh. Because the Court erred in overruling the defendant's objection made under the second count of plaintiff's petition that to permit a recovery against the defendant on account of the agreement alleged in said second count was to deprive the defendant of its liberty and right to contract without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

And within four days after the rendition of said verdict, and on, to wit, the 10th day of October, A. D. 1917, the defendant duly filed in said court in said cause in writing its motion in arrest of judgment in said case, which said motion (omitting the formal caption) is in the following words and figures, to wit:

Motion in Arrest of Judgment.

Now comes the Prudential Insurance Company of America, the defendant herein, and moves the Court to arrest the judgment rendered in this cause and assigns for reasons and grounds of motion:

First. That the first count of plaintiff's petition filed herein does not state facts sufficient to constitute a cause of action against this defendant.

Second. That the second count of plaintiff's petition filed herein does not state facts sufficient to constitute a cause of action against this defendant.

Third. That the Court had no jurisdiction of the subject matter of the alleged cause of action stated in the first count of plaintiff's petition, because Section 3020 of the Revised Statutes of Missouri, 1909, on which said count was founded, is unconstitutional and void as pleaded in defendant's answer.

69 Fourth. That the Court had no jurisdiction of the subject matter of the alleged cause of action stated in the second count of plaintiff's petition to enforce said alleged cause of action and to permit a recovery was to deprive the defendant of its property and liberty of contract in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States as pleaded in defendant's answer.

And thereafter, at the October Term, A. D. 1917, of said court, and on, to wit, the 5th day of November, A. D. 1917, the said Court, upon consideration of said motion for new trial, overruled the same.

To which action of the Court in so overruling the said motion for a new trial defendant, by counsel, at the time duly objected and excepted, and still continues to object and except.

And on said same 5th day of November, A. D. 1917, at the October Term of said court, the Court, upon a consideration of said motion in arrest of judgment, overruled the same.

To which action of the Court in so overruling said motion in arrest of judgment, the defendant, by counsel, at the time duly objected and excepted, and still continues to object and except.

And thereafter, at said October Term, A. D. 1917, and on the 12th day of November, A. D. 1917, said defendant duly filed in said court in said cause in writing, their affidavit for an appeal, which said affidavit (omitting the formal caption) is in the words and figures following:

70 *Motion for Appeal.*

John H. Holliday, being duly sworn, makes oath and says that he is the agent and attorney for the Prudential Insurance Company of America, defendant in the above-entitled cause, and that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

JOHN H. HOLLIDAY.

Subscribed and sworn to before me this 10th day of November, A. D. 1917.

My commission expires August 23, 1921.

E. T. BRIGHT,
Notary Public.

[SEAL.]

And on said same 12th day of November, A. D. 1917, at said October Term of said court, said Court duly allowed said defendant an appeal in said cause to the Supreme Court.

And on said same 12th day of November, A. D. 1917, said defendant duly filed in said court in writing its appeal bond.

And on said same 12th day of November, A. D. 1917, said Court duly approved said appeal bond and allowed the defendant sixty days in which to file its bill of exceptions in said cause.

And now, within the time granted above, and in order that the above matters and things, evidence, motions, documents, objections, rulings, exceptions, verdict, judgment, affidavit for appeal, and appeal bond, may be and become a part of the record in this cause, and subject to review by said Supreme Court, the defendant
71 presents to said court this, its bill of exceptions in said cause, and prays said court to sign, seal and approve the same as a true and correct bill of exceptions in said cause, which is accordingly done this 28th day of December, A. D. 1917.

KARL KIMMEL,
Judge Division No. 7, Circuit Court,
City of St. Louis, Missouri.

Approved:
EDWARD H. ROBINSON AND
F. H. BACON,
Attorneys for Plaintiff.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Filed Dec. 28, 1917.
NAT GOLDSTEIN,
Clerk.

72 *Index.*

74 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit, at the October Term, nineteen hundred and seventeen of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the eighth day of October, 1917, it being the sixth day of the October Term, 1917 of said Court, the following proceedings were had in cause No. 82986, Series "A" of the causes in said Court, wherein Robert T. Cheek, is plaintiff, and The Prudential Insurance Company of America, a corporation, is defendant, to-wit:

Monday, October 8th, 1917.

82986-A.

ROBERT T. CHEEK

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation.

Now at this day come the parties hereto, by their respective attorneys, and this cause coming on for hearing comes also a jury, to-wit; John H. W. Bockstette, Frederick F. Cox, Thomas Coxall, Adolph J. Eirich, J. Berry Furniss, William J. Walsh, Walter E. Grote, Frank A. Windler, Laurence J. Kinsella, Benedict Lienert, Alfred F. Wittich, James E. Morrisey, twelve good and lawful men, duly elected, tried and sworn, well and truly to try the issues herein joined and a true verdict render according to the law and the evidence, thereupon the trial of this cause progressed and being finished the jurors aforesaid, upon their oaths as aforesaid, say "we the jury in

the above entitled cause do find in favor of the plaintiff on the 1st count of plaintiff's petition and we assess his actual damages at the sum of Two Hundred Dollars damages.

And we further asses his punitive damages at the sum of Four Hundred Dollars.

And we further find in favor of the plaintiff on the 2nd count of plaintiff's petition and we assess plaintiff's actual damages
75 at the sum of Three Hundred Dollars, and we further assess his punitive damages at the sum of Six Hundred dollars. Frank A. Windler, Foreman":

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the total damages aforesaid as assessed, to-wit: the sum of Fifteen Hundred Dollars ($1,500.00), together with costs of suit and have therefor execution.

Verdict and instruction filed.

And at the said October Term, 1917, of said Court, the following further proceedings were had in said cause, to-wit:

Monday, November 12th, 1917.

81986-A.

ROBERT T. CHEEK

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Now at this day comes the defendant by its attorney, and upon its motion, and for good cause shown, it is ordered that said defendant have sixty days' additional time, within which to file its bill of exceptions herein, thereupon defendant files and presents to the Court an affidavit for appeal, and an appeal bond, in the sum of $3,000. with the National Surety Company, as surety, and prays an appeal in the above entitled cause, and the Court having seen and examined said affidavit and bond, doth order that said bond be approved which is done; and that an appeal be, and is hereby allowed the defendant, to the Supreme Court of the State of Missouri, from the judgment or decision of the Court, heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify, that the above and foregoing, contains a full, true, and complete transcript of the judgment in the above entitled cause, showing the term, day of the term, month and year in which the same was rendered,
and also of the order granting an appeal in said cause, as fully
76 as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 27th day of November, Nineteen Hundred and Seventeen.

[SEAL.] NAT GOLDSTEIN,
Clerk Circuit Court.

77 April 14th, 1918.

Hon. J. D. Allen,
Clerk of the Supreme Court,
Jefferson City, Mo.

DEAR SIR:

The undersigned represent the Respondent, Robert T. Cheek, and Appellant, Prudential Insurance Company of America in the case of Cheek v. Prudential, now pending in the Supreme Court on second appeal.

We had assumed that the case would be set for argument this spring, as it is the second appeal. The case involves important questions and we would appreciate as early a setting as possible.

Yours very truly,

E. H. ROBINSON AND
F. H. BACON,
Attorneys for Respondent.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellant.

78 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Stipulation.

It is hereby stipulated and agreed by and between counsel for appellant and counsel for respondent in the above entitled cause that the same may be taken as submitted on briefs.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellant.
E. H. ROBINSON AND
F. H. BACON,
Attorneys for Respondent.

79 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion for Rehearing.

Fordyce, Holliday & White, Attorneys for Appellant.

A true copy.
Attest:
JOS. FLORY,
Clerk,
By H. B. ENGLISH,
Deputy Clerk.

80 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion for Rehearing.

Now at this day comes the appellant and respectfully moves the Court to grant a rehearing in the above-entitled cause, and for grounds for said motion states that questions decisive of this cause and duly submitted by counsel have been overlooked by the
81 Court; that the decision is not in conformity with the Constitution of the State of Missouri or the Constitution of the United States.

That controlling decisions, to which the attention of the Court was called, which conclusively show that Section 3020 of the Revised Statutes of Missouri 1909, being the so-called anti-blacklisting law, is unconstitutional and void, have not been considered by the Court.

First. Section 3020, Revised Statutes of Missouri 1909, being the so-called anti-blacklisting law, is unconstitutional and void, in that it violates the Constitution of Missouri and more particularly Section 14 of Article II, Section 30 of Article II and Section 53 of Article

IV of said Constitution, in that it is discriminatory, is class legislation and infringes on the right of free speech.

Ex parte Harrison, 212 Mo. 88;
Wallace v. Railroad Company, 94 Ga. 732;
Atchison, Topeka & Santa Fe R. R. v. Brown, 107 Pac. 459;
Griffin, 171 S. W. 703.

Second. Said section of the statute is unconstitutional and void in that it violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, being an invasion of personal liberty and a deprivation of the right of property without due process of law, in violation of said Constitution.

See authorities cited under the first point.

82 & 83 Also

Adair v. U. S., 208 U. S. 161;
Coppage v. Kansas, 236 U. S. 1;
State v. Julow, 129 Mo. 163.

All of which is respectfully submitted.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellant.

84 In the Supreme Court of Missouri, Division No. 1, October Term, 1916.

No. 17865.

ROBERT T. CHEEK, Appellant,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Respondent.

Motion to Transfer to Court In Banc.

Fordyce, Holliday & White, Attorneys for Respondent.
Edward D. Duffield, James Guest, of Counsel.

85 In the Supreme Court of Missouri, Division No 1, October Term, 1916.

No. 17865.

ROBERT T. CHEEK, Appellant,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Respondent.

Motion to Transfer to Court In Banc.

Now at this day comes the respondent and respectfully moves the Court to transfer the above-entitled cause to the Court en banc for its decision in accordance with the provisions of Section 4 of the amendment of 1890 to Article VI of the Constitution of the State of Missouri, and for grounds for such motion respondent shows to the Court that a Federal question is involved in this cause, to-wit: Whether Section 3020 of the Revised Statutes of Missouri, 1909, upon
86 which appellant's cause of action is founded, violates Section 1, of Article XIV of the amendments to the Constitution of the United States.

Said Section 3020 of the Revised Statutes of Missouri of 1909 reads as follows:

"Section 3020. Letter of Dismissal to be Given Employes Quitting Service.—Whenever any employe of any corporation doing business in this state shall be discharged, or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of services rendered by such employe to such corporation, and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the County Jail for a period not exceeding one year, or by both such fine and imprisonment."

Respondent contended in the court below, and in its brief filed in this court, and still contends that said Section 3020 of the Revised Statutes of Missouri, 1909, is unconstitutional, and violates Section 1 of Article XIV of the Amendments to the Constitution of
87 the United States, in that it abridges the privileges and immunities of the respondent and deprives the respondent of its

liberty of contract and of its property without due process of law, and denies to the respondent the equal protection of the laws.

See:

Ex parte Harrison, 212 Mo. 88;
Wallace v. Railway Company, 92 Ga. 732;
Atchison, Topeka & Santa Fe Railroad Co. v. Brown, 102 Pac. 459;
Bedford Quarry Co. v. Bough, 168 Ind. 671,

and more particularly the case of

St. Louis & Southwestern Railroad Company v. Griffin, 171 S. W. 703,

where the Supreme Court of Texas, in reversing the decision of the Court of Civil Appeals, held a similar statute of the State of Texas unconstitutional, and in the course of its opinion said:

"The requirement that the corporation give to the discharged employe, on his demand, a statement of the 'true cause' for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else how could the 'true cause' be given? The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law, in violation of this provision of the Fourteenth Amendment to the Constitution of the United States:

" 'Nor shall any state deprive any person of life, liberty or property without the due process of law, nor deny to any person
88 & 89 within its jurisdiction the equal protection of the laws.' "

See, also:

Adair v. U. S., 208 U. S. 161;
Coppage v. Kansas, 236 U. S. 1;
State v. Julow, 129 Mo. 163.

Furthermore, in the case at bar, to apply said Section 3020 to the contract of employment existing between said Cheek and the respondent, would be to impair the obligation of such contract, in violation of Section 10, of Article 1 of the Constitution of the United States, since the record in this cause shows that said Cheek entered the employment of the respondent in the year 1898 and said Section 3020 of the Revised Statutes of Missouri was not enacted until the year 1905.

Respectfully submitted,

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Respondent.

90 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion to Transfer to Court en Banc.

Fordyce, Holliday & White, Attorneys for Appellant.

A true copy.

Attest:

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk,
By H. B. ENGLISH,
Deputy Clerk.

91 In the Supreme Court of Missouri, Division No. 1, October Term, 1918.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion to Transfer to Court en Banc.

Now at this day comes the appellant and respectfully moves the Court to transfer the above-entitled cause to court en banc, and for grounds for said motion states that a Federal question is involved, namely, whether Section 3020 of the Revised Statutes of
92 Missouri, 1909, violates the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States and therefore that under the provisions of Section 4 of the Amendment of 1890 to Article VI of the Constitution of Missouri said cause should be transferred to court en banc.

Respectfully submitted,

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellant.

93 In the Supreme Court of Missouri, October Term, 1918.

Div. No. 1.

No. 20774.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Motion of Respondent for Modification of the Opinion.

The Appellant Company has filed its motion for a rehearing and to transfer this case to the court en banc. In its opinion the Court adheres to its former opinion, 192 S. W. 387, but remands the case to the St. Louis Court of Appeals for the reason that the former opinion being the law of the case, there is no constitutional question involved and the amount involved being less than seven thousand five hundred dollars, the Court of Appeals has jurisdiction.

If this case is remanded to the Court of Appeals it cannot be reached, even if advanced, before the October Term next. The Appellant, as pointed out in the original brief of Respondent, is desirous of having the questions involved in the case settled by the Supreme Court of the United States. The case has been pending already for more than five years and Respondent therefore requests that the opinion be modified so as to affirm the judgment of the lower court, in order that there may be a final judgment from which the Appellant, if it so desires, can prosecute its appeal to the highest tribunal in the land. The Respondent does not fear the result of such an appeal but inasmuch as such an appeal is ultimately sure to come, we feel that the sooner it comes the better.

Respectfully submitted,

EDWARD H. ROBINSON AND
F. H. BACON,
Attorneys for Respondent.

STATE OF MISSOURI, *ss:*

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, certify that the above and foregoing is a full and complete copy of respondent's motion for modification of opinion in the within entitled cause, as fully as same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 1st day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk.
H. B. ENGLISH,
Dpty. Clerk.

94 [Endorsed:] No. 20774. Div. No. 1. In the Supreme Court of Missouri, October Term, 1918. Robert T. Cheek, Respondent, vs. Prudential Insurance Company of America, Appellant. Motion of respondent for modification of the opinion. Copy. Edward H. Robinson and F. H. Bacon, Attorneys for Respondent.

95 In the Supreme Court of Missouri, October Term, 1918.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appeal from Circuit Court, City of St. Louis.

Now at this day it appearing to the satisfaction of the Court that this Court has no jurisdiction of the said cause, the Court doth order that said cause be and the same is hereby transferred to the St. Louis Court of Appeals.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at October Term thereof, 1918, and on the 30th day of December, 1919, in the above entitled cause.

Given under my hand and the seal of said Court, at the City of Jefferson, this 11th day of June, 1920.

[SEAL.]

J. D. ALLEN,
Clerk,
By PATRICIA NACY,
D. C.

96 STATE OF MISSOURI:

Supreme Court.

Jefferson City, Mo., June 11th, 1920.

Hon. Jos. Flory,
Clerk St. Louis Court of Appeals,
St. Louis, Mo.

DEAR SIR:

The case of Robert T. Cheek v. Prudential Insurance Company of America was taken to the Supreme Court of the United States by virtue of a writ of error, but before said writ of error was sued out, all the papers in said cause were, on March 21st, 1919, sent to you, as per the order of this court transferring the cause to the St. Louis Court of Appeals.

The mandate of the Supreme Court of the United States, dismissing the writ of error in the case mentioned, was filed in this office on May 12th last; and I herewith send you mandate of this Court transferring the cause to the Court of Appeals. The other papers in the case, as stated, have already been sent you.

Yours very truly,

J. D. ALLEN,
Clerk.

97 In the St. Louis Court of Appeals, October Term, 1919.

16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Appellant.

Appeal from Circuit Court, City of St. Louis.

November 4th, 1920.

Now at this day it is ordered and adjudged by the Court that this cause be continued to March, 1920 Term.

98 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appeal from Circuit Court, City of St. Louis.

March 1st, 1920.

Now at this day it is ordered and adjudged by the Court that this cause be continued to May 10th, 1920.

99 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, Appellant.

Appeal from Circuit Court, City of St. Louis.

May 1-th, 1920.

Now at this day come the said parties by their respective attorneys, and after argument herein, submit this cause to the Court.

100 In the St. Louis Court of Appeals, March, 1920, Term.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appeal from Circuit Court, City of St. Louis.

June 17th, 1920.

Now again come the parties aforesaid by their respective attorneys and the Court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court, City of St. Louis be affirmed and stand in full force and effect; and that said respondent recover of said appellant his costs and charges herein expended and have execution therefor. Opinion filed.

101 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Hon. Karl Kimmel, Judge.

Opinion.

Filed June 17, 1920.

This action was instituted on November 14, 1912, in the Circuit Court of the City of St. Louis; the petition being in two counts. The circuit court sustained demurrers to both counts of the petition, whereupon plaintiff declined to plead further and final judgment was entered for defendant, from which judgment the plaintiff prosecuted an appeal to the Supreme Court where the judgment of the circuit court was reversed and the cause remanded. (See Cheek v. Prudential Insurance Co., 192 S. W. 387.) Thereafter the defendant filed an answer and the cause went to trial, resulting in a verdict for plaintiff on both counts of the petition. From a judgment entered on such verdict defendant appealed to the Supreme Court. On this second appeal the Supreme Court held that the record contained nothing to give it jurisdiction, and transferred the case to this court. (Cheek v. Prudential Insurance Co., 209 S. W. 28.) The cause has been submitted to us on the record and briefs filed in the Supreme Court.

The substance of the pleadings and the evidence, and the nature of the verdict, will appear from the following which we quote
102 from the opinion of the Supreme Court on this appeal, in transferring the case here, namely:

"The petition was in two counts. The first alleges a violation of the provisions of section 3020 of the Revised Statutes of Missouri, 1909, by the wrongful and willful failure of defendant's superintendent to give plaintiff, on his demand therefor, a letter setting forth the nature and character of services rendered by plaintiff to defendant corporation, the duration thereof, and truly stating for what cause plaintiff had quit such service. The second count charges an unlawful conspiracy by way of an agreement between defendant and other insurance companies, including the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company, by which they mutually agreed that neither of said companies would employ any person who had left

the service of either of the others. Each count alleged and asked damages arising from his inability to obtain employment by reason of the matters charged therein, and also asked punitory damages. * * *

"As an 'affirmative defense' to the first count the answer pleaded as follows: 'Defendant avers that said count of plaintiff's petition is founded on Section 3020 of the Revised Statutes of Missouri, 1909, requiring a letter of dismissal to be given employes quitting the service of any corporation doing business in Missouri; that said statute does not impose any penalty upon or give any right of action against said corporation, and that such statute is unconstitutional, in that it is discriminatory and is class legislation and infringes on the right of free speech, all in violation of Section 14 of
103 Article II, of Section 30 of Article II, and of Section 53 Article IV of the Constitution of Missouri, and that said statute is likewise unconstitutional, in that it attempts to deprive this defendant of its property and right of contract without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.'

"For affirmative defense to the second count it pleaded that to permit a recovery on account of the agreement therein alleged would deprive the defendant of its property and of the right to contract, without due process of law in violation of section 1 of Article 14 of the amendments to the Constitution of the United States. Upon these pleadings the cause went to trial resulting in the judgment now before us for review.

"At the trial it was developed in evidence that the defendant had an office in St. Louis, in charge of a superintendent. It was largely engaged in industrial insurance, and, together with the Metropolitan and John Hancock Companies, did practically all the business of that character in the city, although a very small percentage of such policies were written incidentally by other life companies. The plaintiff entered its service in 1898 and remained with it until some time in December, 1911, when he resigned to take a position in Texas with a stove company, for which he expected to work with his son, who became dissatisfied and quit, so that the arrangement was not carried out. The plaintiff resided in St. Louis. During his thirteen years and more of employment by the defendant Company his business had been primarily the solicitation of industrial insurance, although he had taken applications for other life insurance in connection with it. His long service appears from the evidence to have been satisfactory and he had been an assistant
104 superintendent for the Company. Having failed to perfect his arrangement with the Stove Company he applied to defendant for a position and was refused by the president with the statement: 'We have to advise you that we have no vacancies at this time for which you could be considered.' He also applied to both the Metropolitan and the John Hancock Companies for work in that line and was refused because of an understanding between the three Companies to the effect that an agent leaving the employment of

one would not be employed by another of said companies within two years thereafter. The superintendent to whom one of these applications was made, testified that he would certainly have employed him had he had liberty to do so. The plaintiff, in his capacity as assistant superintendent for defendant, had known of this arrangement. After the two years had expired, the plaintiff entered the service of the John Hancock Company, for whom he was still working at the time of the trial in October, 1917.

"In October, 1912, the plaintiff applied to the superintendent of defendant for a letter as provided by section 3020 of the Revised Statutes of Missouri, 1909, and was refused on the ground that it was against the rules or practice of the Company to give such letters.

"Evidence was introduced by plaintiff tending to show actual loss sustained by him by reason of his inability to secure employment in the work of soliciting industrial insurance in St. Louis, both before and after the refusal of the letter.

"Defendant introduced no evidence but asked the court, at the close of plaintiff's evidence, to instruct the jury to find for the defendant on each count of the petition, which it refused, and
105 the cause was submitted to the jury, which returned the following verdict:

" 'We, the jury in the above-entitled cause, do find in favor of the plaintiff on the first count of plaintiff's petition, and we assess his actual damages at the sum of two hundred dollars damages. And we further assess his punitive damages at the sum of four hundred dollars. And we further find in favor of the plaintiff on the second count of plaintiff's petition, and we assess plaintiff's actual damages at the sum of three hundred dollars, and we further assess his punitive damages at the sum of six hundred dollars.'

"Upon this verdict judgment was entered, from which, after motions for a new trial and in arrest overruled, this appeal was taken."

In the opinion of the Supreme Court on the present appeal, in referring to the decision of that court on the first appeal, it is said:

"We then held that the statute upon which the first count stands imposes the duty upon the corporation, through its superintendent or other proper officer, to issue the letter required, and not upon such officer in his individual capacity; that the duty is imposed for the benefit of the employee injured by its breach, who is entitled to maintain an action therefor; and that the statute, as so interpreted, does not violate any of the several provisions of the Constitution of the United States or of the Constitution of the State of Missouri now urged against its validity. We also held that the second count of this petition states a good cause of action, notwithstanding the constitutional and other objections then as now urged against it."

106 With the elimination from the case of the constitutional questions raised by defendant, appellant here, virtually nothing remains in the case for the consideration of this court. The

Supreme Court has held that each count of the petition states a cause of action; and the evidence adduced tends to sustain the averments of each count. And in the view taken by the Supreme Court of the cause of action stated in each count of the petition, the evidence appears to be such as to warrant the allowance of punitive damages on each count, on the ground that the acts of defendant complained of were willful, and done with malice, i. e. malice in law, which consists of the intentional doing of a wrongful act without just cause or excuse.

No question is raised as to the form of the instructions given at plaintiff's request; nor, with the constitutional questions eliminated by the Supreme Court (which alone has jurisdiction in such matters) is there any contention that error was otherwise committed at the trial, beyond the mere statement in appellant's brief that punitive damages were not recoverable—a matter which we have briefly disposed of above. The reason for this may be, as asserted by respondent, that the case is here on this appeal "as a halting port on its voyage to the Supreme Court of the United States." In any event, as the case reaches us, we regard it as our plain duty to affirm the judgment below.

The judgment is accordingly affirmed.
Reynolds, P. J. and Becker, J. concur.

WM. H. ALLEN,
Judge.

107 STATE OF MISSOURI, *set:*

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, do hereby certify that the foregoing is a true copy of the opinion delivered by this Court in the foregoing entitled cause on the 17th day of June, 1920, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said office this 1st day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk,
By H. B. ENGLISH,
D. C.

108 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion for Rehearing.

Fordyce, Holliday & White, Attorneys for Appellant.

109 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appellant's Motion for Rehearing.

Now at this day comes the appellant, and respectfully moves the Court to grant a rehearing in the above-entitled cause, and for grounds for said motion states that questions decisive of this cause and duly submitted by counsel have been overlooked by the Court, and that the decision is not in conformity with the Constitution of the State of Missouri or the Constitution of the United States.

110 That controlling decisions to which the attention of the Court was called, which conclusively show that Section 3020 of the Revised Statutes of Missouri 1909, being the so-called anti-blacklisting law, is unconstitutional and void, have not been considered by the Court.

First. Section 3020, Revised Statutes of Missouri, 1909, being the so-called anti-blacklisting law, is unconstitutional and void, in that it violates the Constitution of Missouri, and more particularly Section 14 of Article II, Section 53 of Article II, and Section 53 of Article IV of said Constitution, in that it is discriminatory, is class legislation and infringes on the right of free speech.

Ex parte Harrison, 212 Mo. 88;
Wallace v. Railroad Company, 94 Ga. 732;
Atchison, Topeka & Santa Fe R. R. v. Brown, 107 Pac. 459.

Second. Section 3020, Revised Statutes of Missouri 1909, being the so-called anti-blacklisting law, is unconstitutional and void, in that it violates Section 1 of Article XIV of the Amendments to the

Constitution of the United States, being an invasion of personal liberty and a deprivation of the right of property without due process of law, in violation of said Constitution.

Ex parte Harrison, 212 Mo. 88;
Wallace v. Railroad Company, 94 Ga. 732;
Atchison, Topeka & Santa Fe R. R. v. Brown, 107 Pac. 459;
Adair v. U. S., 208 U. S. 161;
Coppage v. Kansas, 236 U. S. 1;
State v. Julow, 129 Mo. 163.

111 Appellant also respectfully moves this Honorable Court, in the event it should overrule this motion for rehearing, that this cause should be certified to the Supreme Court of Missouri, for the reason that this cause involves a Federal question, namely, the question whether Section 3020 of the Revised Statutes of Missouri 1909 violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, and that, therefore, jurisdiction of this cause is in the Supreme Court of Missouri.

All of which is respectfully submitted.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellant.

112 In the St. Louis Court of Appeals, March Term, 1920.

No. 16597.

ROBERT T. CHEEK, Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Appeal from Circuit Court, City of St. Louis.

June 23rd, 1920.

Now at this day the Court having fully considered Appellant's motion for rehearing, doth order and adjudge that said motion be overruled.

113 STATE OF MISSOURI,
City of St. Louis, ss:

I, Jos. Flory, Clerk of the St. Louis Court of Appeals, do hereby certify that the above and foregoing is a full, true and complete copy of the record made and proceedings had in the St. Louis Court of Appeals in the above entitled cause as same remain of record and on file in my office.

Witness my hand and the seal of the St. Louis Court of Appeals, this 11th day of September, 1920.

[Seal of St. Louis Court of Appeals, Mo.]

JOS. FLORY,
Clerk.
H. F. ENGLISH,
Deputy Clerk.

Endorsed on cover: File No. 27,934. Missouri, St. Louis Court of Appeals. Term No. 577. Prudential Insurance Company of America, plaintiff in error, vs. Robert T. Cheek. Filed October 9th, 1920. File No. 27,934.

(3334)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Plaintiff in Error,
v.
ROBERT T. CHEEK,
Defendant in Error.
No. 149.

In Error to the St. Louis Court of Appeals, State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

S. W. FORDYCE,
JOHN H. HOLLIDAY,
T. W. WHITE,
W. H. WOODWARD,
W. R. MAYNE,
Attorneys for Plaintiff in Error.

ALFRED HURRELL,
JAMES GUEST,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

INDEX.

Cases Referred to.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Plaintiff in Error,
v.
ROBERT T. CHEEK,
Defendant in Error.
No. 149.

In Error to the St. Louis Court of Appeals, State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the highest court of Missouri having jurisdiction of the case to review on constitutional grounds a judgment in favor of plaintiff and against the defendant in an action for damages.

The action was instituted on November 14th, 1912, when the plaintiff filed in the Circuit Court of the City of St. Louis, Missouri, a petition (Rec., p. 8).

This petition was in two counts. The first count recited that the plaintiff, for more than ten years,

had been engaged as soliciting agent in the business of industrial and ordinary life insurance, and was not experienced in other lines of business, and had no such acquaintance as would enable him to secure employment except as life insurance solicitor in the City of St. Louis (Rec., p. 9).

Plaintiff further stated that he was in the employ of the defendant from June, 1898, to December 7th, 1911, at which time he resigned and left the service of the defendant. That having been in the employ of the defendant for a period exceeding 90 days, the plaintiff on the 3rd day of October, 1912, demanded a letter from the superintendent of defendant in the City of St. Louis, setting forth the nature and character of the services rendered by plaintiff to defendant and the duration thereof and truly stating for what cause plaintiff had quit such service, but that the defendant, through its superintendent, refused to give plaintiff such a letter, although said letter was required by statute, and that because of said refusal the plaintiff had been unable to secure employment from other life insurance companies in the City of St. Louis and had been damaged in the sum of $2,000 actual damages and $3,000 punitive damages.

The statute referred to by the plaintiff in the first count of his said petition was Section 3020 of the

Revised Statutes of Missouri, 1909, which statute reads as follows:

> "Whenever any employe of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of services rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county pail for a period not exceeding one year, or by both such fine and imprisonment."

The second count of plaintiff's petition (Rec., p. 10) stated that the defendant, the Metropolitan Life Insurance Company of New York, and the John Hancock Mutual Life Insurance Company of Massachusetts, had a monopoly of the business of so-called

industrial life insurance in the City of St. Louis. That the plaintiff had for fourteen years been engaged in the business of soliciting applications for industrial life insurance and was unable to earn a livelihood in any other business.

That on December 7th, 1911, plaintiff resigned from the service of the defendant and sought employment in the same line of business from said Metropolitan Life Insurance Company and John Hancock Mutual Life Insurance Company but was unable to obtain employment from said companies because of an agreement between the three of said companies that no one of them would for a period of two years employ any man who had for any reason left the service of or been discharged by either of the other said companies.

Plaintiff further alleged that by reason of said agreement he had suffered actual damages in the sum of $3,000 and punitive damages in the sum of $5,000.

The defendant filed a demurrer to each count of plaintiff's said petition, which demurrers were on February 18th, 1918, sustained by the Circuit Court of the City of St. Louis, whereupon the plaintiff declined to plead further and there was judgment on the demurrers for the defendant, from which decision plaintiff appealed to the Supreme Court of

Missouri, which court reversed the decision of the Circuit Court and remanded the case for trial on the merits.

See *Cheek v. Prudential Insurance Company of America*, 192 S. W. Rep. 387.

On this first appeal defendant briefed and argued its contentions that Section 3020, Revised Statutes of Missouri, 1909, upon which the first count of plaintiff's petition was founded, violated both the provisions of the Missouri Constitution, hereinafter referred to, and Section 1 of the Fourteenth Amendment of the Constitution to the United States, as well as its contention that to permit a recovery on the alleged cause of action stated in the second count of plaintiff's petition would deprive the defendant of its right of contract and property without due process of law in violation of said first section of the Fourteenth Amendment to the Constitution of the United States. These contentions of defendant were fully discussed by the Court in the opinion above cited and ruled adversely to the defendant, but in view of the fact that there was no final judgment defendant could not then apply to this court.

After the case was remanded, defendant on October 8th, 1917, filed an answer to said petition (Rec., p. 11). The answer to the first count of plaintiff's

petition contained, first, a general denial, and second, a plea that said **first** count of plaintiff's petition was by its terms founded on Section 3020 of the Revised Statutes of Missouri, 1909, requiring a letter of dismissal to be given employes quitting the service of any corporation doing business in Missouri; that said statute does not impose any penalty upon or give any right of action against said corporation and that said statute was unconstitutional in that it was discriminatory, class legislation and infringed on the right of free speech, all in violation of Section 14 of Article II, of Section 30 of Article II, and of Section 53 of Article IV, of the Constitution of Missouri, and that said statute is likewise unconstitutional in that it deprives this defendant of its property and right of contract without due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

The answer to the **second** count of plaintiff's petition contained first, a general denial, and second, a plea that to permit a recovery against this defendant because of any alleged agreement with other companies that neither would for a period of two years from the time an employe left the employ of any of the other companies employ any man who had for any reason left the service of or been discharged by either of the other companies, would be to deprive

the defendant of its property and of its right to contract without due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

On the issues so made up the case went to trial and resulted (Rec., p. 12) in a verdict in favor of plaintiff on both counts of the petition.

From the judgment entered on this verdict defendant duly appealed to the Supreme Court of Missouri, having preserved throughout the trial, and in its instructions (Rec., p. 50) and motion for new trial (Rec., p. 52) all of the constitutional points raised in its answer, but the Supreme Court of Missouri in an opinion which will be found under the heading of Cheek v. Prudential Insurance Company of America, 209 S. W. 928, refused to take jurisdiction of said cause on the ground that the constitutional questions involved had been decided on the former appeal (192 S. W. 387) and had become the law of the case and that as the verdict was for only $1,500 it was less than the jurisdictional amount required by the statutes of the State of Missouri (Sections 3937 and 3938, Revised Statutes of Missouri, 1909), and the cause would be transferred to the St. Louis Court of Appeals for final disposition. Defendant's motion for rehearing was overruled (Rec., p. 59).

At this juncture defendant, being in doubt as to whether this decision of the Supreme Court was a final judgment or decree from which writ of error would lie to the Supreme Court of the United States, sued out a writ of error, which was duly allowed and filed as No. 418 of the October Term, 1919, of this court.

The plaintiff, however, filed a motion as defendant in error to dismiss the writ of error on the ground that the decision of the Supreme Court of Missouri was not a final judgment or decree to review which a writ of error to this Court would lie, and on the 8th day of March, 1920, this Court dismissed the writ of error for want of jurisdiction upon the authority of

Schlosser v. Hemphill, 198 U. S. 173, 175;
Louisiana Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, 191;
Grays Harbor Company v. Coats-Fordney Co., 243 U. S. 251, 255;
Bruce v. Tobin, 245 U. S. 18, 19.

Accordingly, on May 1st, 1920 (Rec., p. 67), the cause was submitted to the St. Louis Court of Appeals and on June 17th, 1920 (Rec., p. 67) the St. Louis Court of Appeals affirmed the judgment in favor of plaintiff and against defendant and filed

an opinion (Rec., p. 68) (223 S. W. 754) in which the Court adopted and followed the rulings of the Supreme Court.

After motion for rehearing (Rec., p. 72) and motion to certify to the Supreme Court of Missouri on account of the constitutional questions involved (Rec., p. 73) had been overruled by the St. Louis Court of Appeals, this writ of error was sued out and allowed.

STATEMENT OF FACTS.

The undisputed facts in this case are that plaintiff, Robert T. Cheek, was in the service of the defendant, Prudential Insurance Company of America, from June 1st, 1898 to December 2nd, 1911 (Rec. p. 20), working at different places until October, 1904, at which time he came to St. Louis, Missouri, and remained in the service of the defendant there until December 2nd, 1911 (Rec., p. 20).

On November 25th, 1911 (Rec., p. 29) plaintiff wrote defendant the following letter:

> "Mr. W. S. Decker, Div. Mgr.,
> Newark, N. J.
> Dear Sir:
>
> I herewith tender my resignation, effective December 2nd, 1911. The cause of me resigning is I am offered another position, whereby I believe I can better my condition.
>
> Thanking the company for the many favors shown me in the past, I am,
>
> Very resply.,
>
> R. T. CHEEK,
> Agt.
>
> P. S.: Please acknowledge receipt of this communication.
>
> R. T. CHEEK."

Plaintiff's resignation was reluctantly accepted by the company (Rec., p. 33).

The other position referred to in the letter was to be a traveling salesman for the Never-Break Range Company, of the City of St. Louis (Rec., p. 31), but plaintiff, although he expected to make more in that work than he had been making with the defendant (Rec., p. 31), afterwards voluntarily decided not to go with the Never-Break Range Company, because plaintiff's son, who had been working for that company as a traveling salesman, grew tired of traveling and decided to leave the company's employ. This decision was reached on February 1st, 1912, and plaintiff then engaged in the business of selling sick and accident insurance during the spring and summer of 1912, meanwhile making various efforts to obtain employment as an agent to solicit industrial insurance from the Metropolitan Life Insurance Company or the John Hancock Mutual Life Insurance Company.

About October 1st, 1912 (Rec., p. 24) plaintiff applied to C. A. Sullens, superintendent of one of defendant's offices in the City of St. Louis, for a letter of reference, which Sullens refused to give on the ground that it was not the practice of the company to give letters of reference (Rec., p. 25). Thereafter plaintiff continued to work for various companies selling sick and accident insurance until February 1st, 1914, when he went to work for the

John Hancock Mutual Life Insurance Company (Rec., p. 28), and had continued in the employ of that company to the date of the trial.

The disputed facts in the case were whether the defendant, the Metropolitan Life Insurance Company, and the John Hancock Mutual Life Insurance Company had a monopoly of the business of soliciting and selling industrial life insurance in the City of St. Louis, Missouri, and whether any agreement existed between these three companies, by the terms of which no one of them would employ in the St. Louis, Missouri, district, a man who had formerly worked in that district for either of the other companies for a period of two years after he left the service of said company.

It is true that the defendant offered no evidence in the trial court, and elected to stand upon the plaintiff's case (Rec., p. 48), but counsel for defendant have contended throughout and still submit that even giving every favorable inference to the competent evidence offered by the plaintiff, neither of the above disputed questions of fact were established for the plaintiff.

ASSIGNMENT OF ERRORS.

The assignment of errors will be found in the record, commencing at page 5, and are as follows:

1. The judgment of the St. Louis Court of Appeals deprives the plaintiff in error of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri (Section 3020 of the Revised Statutes of Missouri for 1909), and the course of judicial construction thereof by the courts of Missouri, authorizes the imposition of damages and authorizes the taking of property by pretended processes of law which are not actual processes of law, in that it permits the imposition of damages for the failure of the superintendent of a corporation to give a letter of dismissal to employes quitting the service of said corporation, without requiring the finding or determination of the existence of a contract therefor.

2. The St. Louis Court of Appeals erred in refusing to hold that the Court below erred in failing to direct a verdict for the defendant upon the first count of the plaintiff's petition at the close of the plaintiff's case and at the close of the whole case, as requested, for the reason that said first count of plaintiff's peti-

tion is based upon an alleged violation of Section 3020 of the Revised Statutes of Missouri, 1909, requiring the superintendent or manager of a corporation to give a letter of dismissal to employes quitting the service of said corporation, and for the reason that said statute is unconstitutional and void because in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 30 of Article II of the Constitution of Missouri, and because the construction thereof by the Court constitutes a rule of judicial construction violative of said provisions of said State and Federal Constitutions, and because the application of said statute to the facts of the case denies the defendant due process of law as guaranteed to it by the Federal and State Constitutions.

3. The judgment of the St. Louis Court of Appeals deprives the defendant of its liberty of contract without due processs of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri (Section 3020 of the Revised Statutes of Missouri, 1909) and the course of judicial construction thereof by the courts of Missouri, authorize the imposition of damages flowing from the agreement between insurance companies that such companies would not employ agents of other com-

panies to work in the same district in which said agents had been employed by such insurance companies within a period of two years after such agents had left the employ of said insurance companies.

4. The St. Louis Court of Appeals erred in refusing to hold that the court below erred in failing to direct a verdict for the defendant on the second count of the plaintiff's case and at the close of the whole case, as requested, for the reason that said second count of plaintiff's petition is based upon the theory that because of said Section 3020 of the Revised Statutes of Missouri, 1909, the defendant could not lawfully agree with other insurance companies that neither the defendant nor said other insurance companies would employ agents or servants of any one of them to work in the same district in which said agents or servants had been employed by said other insurance companies within a period of two years after said agents or servants had left the employ of said other insurance company, and for the reason that the judgment rendered against the defendant upon said second count of plaintiff's petition deprives the defendant of its property and of its liberty of contract without due process of law, contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

5. The St. Louis Court of Appeals erred in failing to hold that the court below erred in giving to the jury the first instruction requested by the plaintiff for the reason that said instruction is based upon said Section 3020 of the Revised Statutes of Missouri, 1909, and for the reason that said statute is unconstitutional and void in that it violates Section 30 of Article II of the Constitution of Missouri and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

6. The St. Louis Court of Appeals erred in failing and refusing to hold that the court below erred in giving to the jury the second instruction requested by the plaintiff, in that said instruction is based upon the assumption that the defendant could not lawfully agree with other insurance companies not to employ agents or servants of said other insurance companies within two years after said agents or servants had left the employ of said other insurance companies to work in the same district wherein they had previously been employed, and for the reason that said action of the court deprived the defendant of its liberty of contract and of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

7. The St. Louis Court of Appeals erred in holding that Section 3020 of the Revised Statutes of Missouri,

1909, as construed by the courts of Missouri, is constitutional and in refusing to hold that said statute as construed deprives the defendant of its property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Supreme Court of Missouri having on first appeal decided the Federal questions in this case adversely to the contentions of defendant and having reversed and remanded the case for trial on the merits, and then having on second appeal held that its first opinion disposed of the constitutional questions involved, and that, therefore, jurisdiction to render final judgment was in the St. Louis Court of Appeals, and hence transfered this cause to the St. Louis Court of Appeals where final judgment affirming the judgment of the court below was entered, this judgment of the St. Louis Court of Appeals was the judgment of the highest state court for the purposes of this writ of error.

The history of this case has been set out in full in order that this Court may be advised why this writ of error runs to the St. Louis Court of Appeals instead of to the Supreme Court of Missouri.

As hereinbefore stated when the case was first filed in the Circuit Court of the City of St. Louis, defendant demurred to both counts of plaintiff's petition, setting up the Federal questions here involved and this demurrer was sustained. Plaintiff thereupon ap-

pealed to the Supreme Court of Missouri, and that court in an opinion which expressly ruled adversely upon the Federal questions raised by defendant (192 S. W. 387), reversed and remanded the case for trial, holding that each count of plaintiff's petition stated a cause of action against defendant.

Thereupon defendant filed an answer in the Circuit Court expressly raising the Federal questions relied upon by it and went to trial. From the verdict and judgment in favor of plaintiff, defendant again appealed to the Supreme Court of Missouri.

That court, however, in a second opinion (209 S. W. 928), held that since the constitutional questions involved in the case had been finally decided on the first appeal and as the verdict was for only $1,500, which is less than the jurisdictional amount required for appeals to the Supreme Court, transferred the case for final decision to the St. Louis Court of Appeals.

After this decision the defendant sued out a writ of error to this court, which was afterwards dismissed for want of jurisdiction on the ground that the judgment appealed from was not final.

The cause was then submitted in the St. Louis Court of Appeals and that court affirmed the judgment of the court below in favor of plaintiff and against defendant (223 S. W. 754).

After a motion for rehearing and a motion to certify to the Supreme Court of Missouri had been overruled, this writ of error was sued out.

This Court had occasion to consider the question of writ of error running to a Missouri Court of Appeals in the recent case of **Mergenthaler Linotype Company v. Davis**, 251 U. S. 256.

In that case the Springfield Court of Appeals had affirmed a judgment of the Circuit Court. The case then went to the Supreme Court of Missouri on certiorari and the Supreme Court quashed this judgment of the Court of Appeals and remanded the case to that Court for decision. Thereupon the Court of Appeals reversed the judgment of the Circuit Court and thereupon writ of error was sued out to this Court.

On objection to the jurisdiction this Court held that the judgment of the Springfield Court of Appeals was a judgment of the highest State Court for the purpose of the writ of error.

In the course of the opinion the Court said at page 258:

> "Under the Missouri practice and circumstances here disclosed we think the judgment of the Springfield Court of Appeals was final within the meaning of Section 237, Judicial Code. No suggestion is made that further review by the Supreme Court could be had as a matter of discretion or otherwise."

Another recent case in this court holding that a writ of error will run direct to a Missouri Court of Appeals where it appears that a judgment of that Court is final is *New York Life Insurance Company v. Dodge*, 246 U. S. 357.

And see further in this connection:

Lane v. Wallace, 131 U. S. 219;
Kentucky v. Powers, 201 U. S. 1;
Blagge v. Balch, 162 U. S. 439.

As the St. Louis Court of Appeals in its opinion (Rec., p. 68) contented itself with referring to and adopting the reasoning of the Supreme Court in its opinions (192 S. W. 387), (209 S. W. 928), counsel in this argument will refer directly to said opinions of the Supreme Court.

II.

Section 3020 of the Revised Statutes of Missouri, 1909, as construed and applied in this case violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its right of contract and of its property without due process of law and denies the defendant the equal protection of the laws.

The first count of plaintiff's petition, in which he sought damages against the company was founded

upon Section 3020 of the Revised Statutes of Missouri, 1909. This section reads as follows:

> "Letter of Dismissal to be Given Employes Quitting Service.—Whenever any employe of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

This statute does not in terms impose a duty on the corporation itself or give a right of action against the corporation. On the contrary the duty is made personal to the superintendent or manager of the

corporation and makes such superintendent or manager guilty of a misdemeanor punishable by fine or imprisonment or by both fine and imprisonment. The statute should be strictly construed, not only because it is a penal statute, but because it creates a duty not imposed upon employers at common law.

These contentions were fully argued and briefed by defendant when this case first went to the Supreme Court of Missouri, but that court in its opinion, which has never been officially reported and therefore must be referred to under the citation of 192 S. W. 387, held that the statute in question imposed a duty upon the corporation itself and gave a right of action in a civil suit for damages against the corporation.

In so ruling, the Supreme Court of Missouri disregarded the following well-settled rules of law:

> First. A duty created by statute is measured by the statute and will not be extended beyond the terms of the act (*1 Corpus Juris*, page 952).
>
> Second. If an act made criminal is not actionable independently of the statute, the criminal statute ordinarily gives no private right of action therefor (*1 Corpus Juris*, page 954).

The Supreme Court of Missouri also disregarded the rules of construction laid down in its own previous decisions.

In the case of *Riddick v. Governor*, 1 Mo. 147, it was said:

> "It is an incontrovertible maxim of law that a statute imposing a penalty for a new created offense or for a breach of duty and defining the particular mode in which and before what tribunal the penalty shall be recoverable must be strictly pursued."

In the case of *State v. Read*, 125 Mo. 43, the Court said at page 48:

> "A familiar rule of construction of criminal statutes is that they should be strictly construed and not extended or enlarged by judicial construction so as to embrace offenses and persons not plainly within their terms. The reason of the rule is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is vested in the legislature and not in the judicial department."

Other Missouri cases to the same effect are:

Howell v. Stewart, 54 Mo. 400;
State v. Yaeger, 63 Mo. 403;
State v. Gritsner, 134 Mo. 512;
Utley v. Hill, 155 Mo. 232;
Kansas City Loan and Guaranty Co. v. Kansas City, 206 Mo. 159;
State v. Koock, 202 Mo. 223.

It seems too plain for argument that the statute in question did not impose any penalty upon the corporation itself on account of the failure of its superintendent or manager to give the letter required, and it is certain that the statute did not in terms give the employe a right of action for damages against the corporation on account of failure to receive such a letter.

The petition filed by the plaintiff in this case expressly founded his right of action in the first count on the statute in question, and not on any right given by common law, but in order to determine the effect of the construction and application of this statute in the case at bar, counsel for the Company will here briefly discuss the question as to whether plaintiff had any right of action at common law against the Company on account of the refusal of the superintendent to give him the letter requested.

III.

At common law an employer is under no obligation to furnish a recommendation or letter of dismissal to an employe.

> "At common law no duty is imposed on an employer to give his employe a testimonial of character, letter of recommendation, or clearance card on the severance of the relation, in the absence

of any custom or usage requiring it. And unless restrained by contract, the master may suspend or discharge an employe at pleasure, with or without cause, and the fact that the employe's reputation is affected by unfavorable inferences drawn from the suspension or discharge does not render the employer liable in damages" (26 Cyc 996).

In this case plaintiff's petition did not set up any contract, custom or usage whereby the employer was required to give a letter of dismissal or clearance and no evidence tending to show that such was the contract, custom or usage was introduced or offered by the plaintiff.

The following authorities support the language used in stating the rule in the foregoing citation:

"A character is not given for the benefit of the ex-employe, although he may be either injured or benefited by reason of such character being given: nor does the right to give such a character arise out of duty to the employe, but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employe has a legal right to demand it. Such communications have been made, not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good

and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information (Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Bott v. Dawson, 46 Iowa 533; Townshend, Slander & Libel, 4th ed. 396-397, 13 Am. & Eng. Enc. Law, pp. 415, 416; Bacon v. Michigan C. R. R. Co., 66 Mich. 166, 33 N. W. 181). In Parsons, Contr., p. 328, the author says: 'The master is under no legal obligation to give a testimonial of character to his servant.' It is also a well-known rule of law that no man is compelled to enter into business relations with any other person unless he desires so to do, and it is also as well established that upon the dissolution of such business relations no man shall be compelled to divulge to the public his reasons, good or bad, for such dissolution. In Cooley, Torts, p. 328, it is said: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.' A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character of his servant."

Cleveland, C. C. & St. L. R. Co. v. Jenkins,
174 Ill. 398, 62 L. R. A., page 926.

"The theory of the Circuit Court that silence, or refusal to render a statement on request, is in the nature of a slander, and, if its effect is to prevent the person from obtaining employment, it is an actionable wrong, is untenable. As stated at the outset, there was between these parties no contract for a statement, and there is no statute in Ohio requiring it. Indeed, it is doubtful whether one could be made that would be valid (Wallace v. Georgia, C. & N. R. Co., 94 Ga. 732, 22 S. E. 579). It is conclusively shown in Cleveland C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 402, ante, 922, 51 N. E. 811, that no such duty is imposed on the employer by the common law. For convenience of reference some of the authorities there cited are quoted here: 'On examination it will be perceived that this right of an ex-employer to give, as it is termed, a character to his ex-employe, is nothing more than a consequence of the right to communicate one's belief. * * * No one is under any obligation to make such a communication. He does not owe it as a duty either to the employer or the employe to make any communication on the subject' (Townshend, Slander & Libel, 4th ed. 426). 'It is not legally compulsary on a master or mistress to give a discharged servant any character, it matters not how much a servant is entitled to character in fairness, or how cruel the refusal might be' (14 Am. & Eng. Enc. Law, p. 799). 'It is clear, however, that, in the absence of any specific agreement to that effect, there is no legal obligation binding a person who has retained another as a

servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so' (Smith, Mast. & S. Textbook ed., 380, 381). 'The master is under no legal obligation to give a testimonial of character to his servant' (2 Parsons, Contr., Sec. 43, 44)."

New York, Chicago and St. Louis Railroad Company v. Schaffer, 65 Ohio St. 414, 62 L. R. A. 936.

And for another and more recent case holding that at common law the employer is under no duty to give a service letter to his employe when the latter quits his service, see *Dick v. Northern Pacific Railway Co.*, 86 Wash. 211.

As stated in the preceding paragraph of this argument the first count of plaintiff's petition (Rec., p. 9) was expressly founded upon the statute of Missouri here in question, and plaintiff's given instruction (Rec., p. 49) recited that the plaintiff "seeks to recover damages from the defendant on account of the refusal of defendant to give him a letter of dismissal upon leaving its employment such as is required by the statute of this state."

The Supreme Court of Missouri, in its opinion, 192 S. W. 387, which was adopted and followed by the St. Louis Court of Appeals (Rec., p. 68), directly held

that the plaintiff was entitled to recover under the first count of this petition because of this statute of the State of Missouri.

Therefore there can be no question in this case that recovery was allowed on account of the statute and on the statute alone. But the discussion contained in this paragraph of the argument has been here inserted to show that the effect of the decision of the Supreme Court of Missouri was not only to so construe a penal statute as to give a civil right of action for damages against a corporation, although the penalty in the statute was not imposed on the corporation, but also to give a civil right of action against defendant on a state of facts where no right of action existed at common law.

In so construing and applying the Missouri statute, the Supreme Court of Missouri disregarded the following provisions of the Constitution of the State of Missouri:

Article II of Section 14:

> "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty, and that in all suits and prosecutions for libel the truth thereof may be given in evidence and the jury, under the direction of the Court, shall determine the law and the fact."

Article II, Section 30:

> "That no person shall be deprived of life, liberty or property without due process of law."

Article IV, Section 53:

> "The General Assembly shall not pass any local or special law—(24) regulating labor, trade, mining or manufacturing or (26) granting to any corporation, association or individuals any special or exclusive right, privilege or immunity."

In so construing and applying this statute of the State of Missouri, the Supreme Court of Missouri also plainly disregarded the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States, and this statute as applied deprived the company of its right of contract and of its property without due process of law and denied to the company the equal protection of the law.

IV.

Similar statutes have been held unconstitutional and void by the highest courts in every state where the question has been raised.

The first and leading case is *Wallace v. Railroad*, 94 Ga. 732, where the Supreme Court of Georgia, in passing upon an act entitled "An Act to Require Cer-

tain Corporations to Give to Their Discharged Agents or Employes the Cause of Their Removal or Discharge When Discharged or Removed," said:

> "A statute which undertakes to make it the duty of incorporated railroad, express and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for a failing or refusing to do so, is violative of the general private rights of silence enjoyed in this state by all persons, natural or artificial, from time immemorial and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations. enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."

A similar statute in Kansas required any employer upon the request of a discharged employe to furnish in writing the true cause or reason for such discharge. This statute was held unconstitutional by the Supreme Court of Kansas in the case of *Atchison*,

Topeka & Santa Fe Railroad Co. v. Brown, reported in 102 Pac. 459, and in 23 L. R. A. (n. s.), 247, where the Court said at pages 248 and 249:

> "It may be said that, if the law is valid, the company need have no concern as to the effect of its compliance with the letter of the law. This leads us to the principal contention of the company that the law is unconstitutional; that it is repugnant to the eleventh section of the bill of rights of the State of Kansas, which provides that: 'All persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right.' It is also contended that the law is repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law.' It has been conceded in argument that, in the absence of a contract of employment for a definite term, the master may discharge the servant for any reason or for no reason, and that the servant may quit his employment for any reason or for no reason. Such action on the part of the employer or employe, where no obligation is violated, is an essential element of liberty of action. Can one, then, be compelled to give reason or cause for an action for which he may have no specific reason or cause except perhaps a mere whim or prejudice? Again, is not the freedom to

remain silent, to neither write nor publish anything on a certain subject involved as an element in the guaranteed right to 'freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right'? It would seem that the liberty to remain silent is correlative to the freedom of speech. If one must speak, he cannot be said to freely speak.

"The statute in question, like its companion statute (Laws 1897, Chap. 120, page 226), was the outgrowth of the financial and business depression preceding that session of the Legislature. Employers sought to recoup their loss of incomes by scaling the wages of the employes, and laborers sought to resist the decrease in wages, or to compel an advance, by uniting the labor organizations. The remarks of the late Mr. Justice Greene, in holding the provisions of Chapter 120, Laws 1897, unconstitutional are equally applicable to the provisions of the law in question. An excerpt from the opinion in Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L. R. A. 185, 76 Pac. 848, L. A. & E. Ann. Cas. 936, reads: 'Before approaching a discussion of the question, let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. Besides, the Legislature has

no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution, under the guise of a police regulation. **Besides, the Legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution, under the guise of a police regulation.** It must also be remembered that the right which the plaintiff claimed was violated did not originate in contract, but was purely statutory; therefore the determination of the question whether he has any remedy depends entirely upon the validity of this statute.' When the relation of employer and employe has ceased by discharge, or by quitting the employment, if the employe has been efficient and trustworthy, the employer may be under a moral obligation to benefit the employe by giving him a statement to that effect. On the other hand, if the employe has been inefficient or untrustworthy, it may be the employer's moral duty to furnish a prospective employer, upon request, or perhaps without request, a statement of these facts; but the former employer is under no legal obligation so to do either to his ex-employe or to the prospective employer. The public has no interest in the matter, and in neither case can such a duty be imposed as a police regulation, and the attempt by statute to impose the furnishing of such a statement is an interference with personal liberty."

The Supreme Court of Texas, in the case of *St. Louis & Southwestern Railroad Company v. Griffin,*

171 S. W. 703, 106 Tex. 477, L. R. A. 1917-B 1108, reversed prior decisions of the Court of Civil Appeals of Texas holding a similar statute constitutional and declared that such statute violated not only the provisions of the Constitution of Texas, but the provisions of the first section of the Fourteenth Amendment to the Constitution of the United States. In the course of its opinion the Court said:

> "There is no conflict in the evidence to the fact of the employment and discharge of Griffin. The question presented to this court is the validity of a statute enacted by the Legislature as stated above, from which we copy the following provisions:
>
> "'Art. 594. **Discrimination.**—Either or any of the following acts shall constitute discrimination against persons seeking employment: * * * (3) Where any corporation, or receiver of the same, doing business in this state, or any agent or employe of such corporation or receiver, shall have discharged an employe, and such employe demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employe thereof fails to furnish a true statement of the same to such discharged employe, within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation or receiver shall fail, within ten days after written demand for the same, to furnish to any employe voluntarily leaving the service of such corpora-

tion or receiver, a statement in writing that such employe did leave such service voluntarily, or where any corporation, or receiver of the same, doing business within this state, shall fail to show in any statement under the provision of this title the number of years and months during which such employe was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail within ten days after written demand for the same to furnish to any such employe a true copy of the statement originally given to such employe for his use in case he shall have lost or is otherwise deprived of the use of the said original statement' (R. S. 1911, Vol. I, Art. 594) * * *.

" 'The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him. The liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed. When Griffin entered the service of the railroad company for an indefinite time, the law reserved to him the right to quit the service at any time without cause or notice to the employer. The railroad company had the corresponding right to discharge him at any time without cause or notice. The rights of the parties were mutual (E. L. & R. R. Ry. Co. v. Scott, 72 Tex. 75, 10 S. W. 102,

13 Am. St. Rep. 758). In the case cited, the Court said:

> "'"It is very generally if not uniformly held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will, and so without cause (Harper v. Hassard, 113 Mass. 187; Coffin v. Landis, 46 Pa. 431; Wood's Master and Servant, secs. 133, 136, and citations)."'

"If the servant could quit without notice and the master could discharge him at will without notice, the effect of the statute in question would be to preserve the servant's unqualified right to leave the service without cause or notice, but to deny to the corporation the corresponding right to discharge without cause or notice.

"The requirement that the corporation give to the discharged employe, on his demand, a statement of the 'true cause' for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else, how could the 'true cause' be given? The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law, in violation of this provision of the

Fourteenth Amendment to the Constitution of the United States:

> "'Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"But the statute did not stop at the destruction of the corporation's right to discharge the employe without cause, but provided that in case the statement of cause should be refused, or if the cause stated was not the 'true cause,' the state might recover from the corporation a penalty of $1,000.

"But the Legislature did not stop with that provision, for under the construction placed on the law by the Court of Civil Appeals, the discharged employe could recover damages by proving that the cause stated was not true. The proof in this case was that the person who discharged Griffin acted upon the report of another who has oversight of Griffin's work, and there was no controversy that he acted upon that report, but Griffin was permitted to prove that he was capable and did good work, which denied to the employer the right to determine the efficiency of the servant.

"In St. L. S. W. Ry. Co. of Texas v. Hixon, 104 Tex. 267, 137 S. W. 343, this Court held that the law required a true statement of the fact which operated upon the mind of the official or agent who discharged the employe, but did not

require that the fact stated must have been true. Under this most favorable construction, the law is no less in violation of the constitutional right of equal protection of the law as secured by the Fourteenth Amendment to the Constitution of the United States.

"The eighth section of Article 1 of the Constitution of this state is in this comprehensive and clear language:

> "'Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the Court, as in other cases.'

"The liberty to write or speak includes the corresponding right to be silent, and also the liberty to decline to write (Railway Co. v. Brown, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (n. s.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346; Wallace v. Railway Co., 94 Ga. 732, 22 S. E. 579). To say that one can be compelled at the instance of another party to do what he has the constitu-

tional liberty to do or not is a contradiction that is not susceptible of reconciliation."

The Supreme Court of Massachusetts was called upon to answer questions in regard to the validity of a bill pending in the Massachusetts Senate, which prohibited railroad companies from discharging employes without a hearing. In returning negative answers as to the validity of such proposed legislation, the Court said in RE OPINION OF JUSTICES, 108 N. E. 807, 220 Mass. 630, L. R. A. 1917-B, page 1119, l. c. 1120-21:

> "The Fourteenth Amendment to the Federal Constitution prohibits the several states from depriving 'any person of life, liberty, or property, without due process of law.' The Supreme Court of the United States is the final authority upon the scope and meaning of these words. That court has said that 'the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution (Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427). * * * The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circum-stances which exclude the right' (Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133).
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> "In the opinion in Adair v. United States, 208 U. S. 161, at pages 174, 175, 52 L. ed. 436, 442,

443, 28 Sup. Ct. Rep. 277, 280, 13 Ann. Cas. 764, is found this interpretation: 'While * * * the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law are subject to such reasonable restrains as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser * * * to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe.'

"It was said in Coppage v. Kansas, 236 U. S. 1, at page 14, 59 L. ed. 441, 446, L. R. A. 1915 C, 906, 35 Sup. Ct. Rep. 243:

> "'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and

> other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.'

"In the application of these principles it has been held that the right to liberty and property secured by the Fourteenth Amendment was impaired by a statute which prohibited the discharge of any employe because he was a member of a labor union (Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas 764). That decision recently has been reaffirmed in its application to a statute which made unlawful any requirement not to join or remain a member of a labor union as a condition of securing or continuing in employment (Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915 C, 906, 35 Sup. Ct. Rep. 240). The ground upon which these decisions rest is that the freedom of contract guaranteed by the Fourteenth Amendment prohibits the imposition of such restraints upon the right of the employer to decline to employ at all, or to continue to employ, a person whom he does not desire. It there was said that 'the employer must be left at liberty to decide for himself whether such membership by his employe is consistent with the satisfactory performance of the duties of the employment.

"It seems to us impossible to say that the right of an employer to discharge an employe because

of information affecting his conduct in respect of efficiency, honesty, capacity or in any other particular touching his general usefulness without first providing a hearing stands on a different footing or is less under the shield of the Constitution than the right held to be secured in the Adair and Coppage cases. Our own Constitution contains in several clauses similar guaranties of the right to acquire, possess and protect property which doubtless have substantially the same meaning in this respect as has the Fourteenth Amendment to the Federal Constitution. It has been held that the right to acquire, possess and protect property secured by our Constitution 'includes the right to make reasonable contracts, which shall be under the protection of the law' (Com. v. Perry, 155 Mass. 117, 121, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126). In the absence of a contract, conspiracy or other unlawful act, the right of the individual employe to leave the service of the railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employe for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employe, as this statute in substance does, and to require him also, as a prerequisite to the exercise of his right, to enable the employe to make a statement in the presence of someone else—a thing which may be beyond the power of the employer. His freedom of con-

tract would be impaired to an unwarrantable degree by the enactment of the proposed statute. The power of the legislature to require a hearing in connection with the discharge of one employed under the civil service law rests on the authority of the commonwealth to direct the conduct of its government and that of its political subdivisions (opinion of Justices, 208 Mass. 619, 34 L. R. A. [n. s.] 771, 94 N. E. 1044)."

The Supreme Court of Missouri itself had favorably cited and relied upon the case of Wallace v. Railroad, supra, in its opinion in the case of *Ex Parte Harrison*, 212 Mo. 88, where the Court held unconstitutional an act of Missouri of 1907 (see laws of Missouri 1907, page 261) making criminal all publications of any report of a Civic League concerning candidates for office unless certain conditions imposed by the act were complied with by the League.

The Supreme Court of Missouri, in the case of the *State v. Julow*, 129 Mo. 163, held unconstitutional a statute of the State of Missouri reading as follows (page 164):

"Section 1. No employer, superintendent, foreman or other person exercising superintendence or authority over any mechanic, miner, engineer, fireman, switchman, baggageman, brakeman, conductor, telegraph operator, laborer or other workingman shall enter into any contract or agreement with any such employer requiring said em-

ploye to withdraw from any trade union, labor union or other lawful organization of which said employe may be a member, or requiring said employe to refrain from joining any trade union, labor union or other lawful organization, or requiring any such employe to abstain from attending any meeting or assemblage of people called or held for lawful purposes, **or shall by any means attempt to compel or coerce any employe into withdrawal from any lawful organization or society.**

"Section 2. Corporations and the managers, superintendents, overseers, master mechanics, foremen, officers and directors and other exercising authority for and on behalf of corporations doing business in this state shall be subject to the provisions of this act and, upon conviction of the violation of any of its provisions, to the punishment prescribed by it.

"Section 3. Any person or corporation violating any of the provisions of this act shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

In the course of its opinion the Court said, pages 175 and 176:

"Here, the law under review declares that to be a **crime,** which consists alone in the exercise of a constitutional right, to wit, that of termin-

ating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been **prejudiced** in so far as the **criminality** of the act charged is concerned; no question could there be made or admitted as to the **quality** of the act; that would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged, in order to declare the guilt as charged. But the fact as charged as already seen, is **not a crime**, and will not be a crime, so long as constitutional guarantees and constitutional prohibitions are respected and enforced.

"If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he **disobeys** it, then he is punished for the performance of an act **wholly innocent**, unless indeed the doing of such act guaranteed by the organic law, the exercise of a right of which the Legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal. We deny the power of the Legislature to do this; to brand as an **offense** that which the Constitution designates and declares to be **a right**, and therefore an **innocent act**, and consequently we hold that the statute which professes to exert such a power is nothing more or less than a **'legislative judgment,'** and an attempt to deprive all who are included within its terms, of a constitutional right without due pro-

cess of law. In support of these views see State v. Loomis, 115 Mo. 307; Com. v. Perry, 155 Mass. 117; Godcharles & Co. v. Wigeman, 113 Pa. St. 431; State v. Goodwill, 33 W. Va. 179; In re Jacobs, 98 N. Y. 98; People v. Gillson, 109 N. Y. 389; Millett v. People, 117 Ill. 294; Tilt v. People, 27 Chicago Leg. News, 270.

"II. But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class; to **all** workingmen, etc., but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, labor union, etc. Where a statute does this, where it does not relate to persons or things as a class, but to particular persons or things of a class, it is a special, as contradistinguished from a general law. State ex rel. v. Tolle, 71 Mo. 645; State ex rel. v. Herrmann, 75 Mo. 340."

And in answer to the contention that this statute could be sustained as a valid exercise of the police power of the State, the Supreme Court of Missouri said, at page 177:

"IV. Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such regulation, for it does not in terms or by implication promote, or tend to promote, the public health, welfare, comfort or safety; and if it did, the state would not be allowed under the guise and pretense of police regulation, to en-

> croach or trample upon any of the just rights of the citizen, which the Constitution intended to secure against diminution or abridgment (In re Jacobs, 98 N. Y. 98, and cases cited)."

In the face of this and prior decisions here quoted and in the face of all the above well-reasoned opinions from the highest courts of many other states, we find the Supreme Court of Missouri in the case at bar sustaining the validity of Section 3020 of the Revised Statutes of Missouri, 1909, and declaring that it is not obnoxious to any provision of the State Constitution or Federal Constitution and that it may be sustained as a valid exercise of the police power of the State.

Whether or not this conclusion can stand will be discussed in the next paragraph of this argument.

V.

The statute in question cannot be sustained as an exercise of the police power of the state.

The Supreme Court of Missouri in its opinion sustaining the validity of this statute said, 192 S. W. 391:

> "The statute under consideration was enacted in pursuance to the police power of the state and in no manner discriminates against the respondent."

This conclusion is not only contrary to the conclusion reached by the Supreme Court of Missouri in the case of State v. Julow last cited and to the reasoning of the decisions in Wallace v. Georgia, Atchison, Topeka & Santa Fe Railroad Company v. Brown, St. Louis & Southwestern Railroad Company v. Griffin, and In re: Opinion of Justices above cited, but it is also contrary to the conclusions reached in two very recent decisions of this Court.

Thus, in the case of *Adair v. United States,* 208 U. S. 161, this Court said:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the

right of the employer, for whatever reason, to dispense with the services of such employe. It was the legal right of the defendant, Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin. Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employe, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct

towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employe in his personal service any more than an employe can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts, the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

"As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general employment on one side to accept the services of the employe and a general agreement on the other side to render services to the employer—no term being fixed for the continuance of the employment—Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employe because of his being a member of a labor organization."

And in the case of *Coppage v. Kansas*, 236 U. S. 1, this Court said:

"Laying aside, therefore, as immaterial for present purposes, so much of the statute as indi-

cates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

"As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that 'employes, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.' No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employe. Indeed, a

little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

"We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 Sup. Ct. Rep. 761; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his 'financial independence.' In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the state, and not an incident to the advancement of the general welfare. But, in our opinion, the

Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment."

Many other authorities exist which either directly or by analogy refute the reasoning and conclusion of the Supreme Court of Missouri in regard to the validity of the statute in question. A detailed discussion of these authorities would prolong this argument beyond reasonable length, but for the convenience of the Court they are here cited as follows:

People v. Marcus, 185 N. Y. 257, 7 L. R. A. (n. s.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073;

National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 369;

Jacobs v. Cohen, 183 N. Y. 207, 2 L. R. A. (n. s.) 292, 111 Am. St. Rep. 730, 76 N. E. 5;

State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285;

Gillespie v. People, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007;

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098;

Hundley v. Louisville & N. R. Co., 105 Ky. 162, 63 L. R. A. 289, 88 Am. St. Rep. 298, 48 S. W. 429;

Brewster v. C. Miller's Sons Co., 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301;

Arthur v. Oakes, 25 L. R. A. 441, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310;

Jackson v. Berker, 92 Ohio 152.

VI.

The statute in question is unconstitutional and void in that it denied the company the equal protection of the laws.

Counsel for the company submit that the foregoing authorities clearly demonstrate that this statute of Missouri was unconstitutional and void in that it deprived the company of its right of contract and of its property without due process of law, and as a corollary of this proposition it seems equally evident that the statute denied to the company the equal protection of the laws.

The statute penalizes the superintendents or managers of corporations for failure to give the letter in question. No penalty is imposed upon the superin-

tendents or managers of individuals or partnerships engaged in business. Upon what theory can such classification and discrimination be justified, particularly when the only reason given for sustaining the act is that it is a valid exercise of the police power of the state?

The Supreme Court of Indiana, in the case of *Bedford v. Bough*, 168 Ind. 671, held unconstitutional a statute of that state which provided that railroads and other corporations would be liable for injuries to an employe due to the negligence of a servant of the corporation to whose orders the injured employe had to conform. The act by its terms did not apply to individuals or partnerships. The Court said at page 675:

> "It imposes new burdens on private corporations while natural persons carrying on a like business and under like circumstances and conditions are left without such burden. The right of action is made a burden upon the character of the employer and not upon the character of the employment."

Let us suppose the converse of the proposition here involved, namely, that we were dealing with a statute which prohibited superintendents or managers of corporations in Missouri from employing any person unless that person could produce a service letter of

dismissal from his last employer. Is there any doubt in the mind of the Court that such a statute would be held unconstitutional and void?

In the case of *Truax v. Raich*, 239 U. S., page 33, this Court had before it for consideration an act in the State of Arizona which prohibited any company, corporation, partnership, association or individual which employed more than five workers at any time in the State of Arizona, regardless of the kind or class of work, or sex of the workers, from employing less than eighty per cent qualified electors or native-born citizens of the United States.

In holding this act unconstitutional and void the Court said (60 L. Ed., page 135):

> "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure (Butchers' S. H. & L. S. L.

Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, L. R. A. 1915-C, 960, 35 Sup. Ct. Rep. 240). If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power."

And on page 136:

"The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the prin-

ciple underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

VII.

The Supreme Court of Missouri erred in holding that the statute in question became a part of the contract of employment between the plaintiff and the company.

In the course of the opinion of the Supreme Court of Missouri in this case, 192 S. W. 393, the Court said:

"Moreover, when a corporation of this state or one doing business here employs a person to work for it, it thereby by necessary implication, at least, agrees with him to give him a letter of clearance when he leaves the company, as provided for by said statute, for the reason that said statute becomes a part of every contract, and if such a corporation does not want to give such letter, then it had better not employ said person to work for it."

The answer to this argument is twofold: First, it assumes the validity of the statute in question, and, second, it can have no application in this case, because Section 3020, Revised Statutes of Missouri 1909, was not enacted until the year 1905 (see laws of Missouri 1905, at page 178). This was seven years after the plaintiff had originally entered the company's employ and a year after the plaintiff had come to Missouri in the company's employ (Rec., p. 20).

Therefore, if this statute is to be read into the contract of employment between the plaintiff and the company in this case, it is obnoxious for the additional reason that it impairs the obligation of this contract.

For all the above reasons counsel for the company respectfully submit that Section 3020 of the Revised Statutes of Missouri 1909, upon which the first count of plaintiff's petition was based, violates the constitutional rights guaranteed to the company by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

We will now turn to a discussion of plaintiff's right of action and recovery under the second count of his petition.

VIII.

The courts of Missouri in holding that the plaintiff was entitled to recover against the company on account of an alleged agreement between the company and other insurance companies whereby each of the companies agreed that it would not for a period of two years employ in the same district an employe who had left the service of any of the other companies deprived the company of its liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The second count of plaintiff's petition contains the following averment (Rec., p. 10):

> "Plaintiff states that heretofore, to wit, on or about December 7, 1911, he resigned from the service of the defendant and sought employment in the same line of business from other corporations engaged in the business of industrial life insurance in the said City of St. Louis, particularly the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company. Plaintiff states that he was unable to obtain employment with any of the said companies because of an agreement between them that neither would, for a period of two years from an employe leaving the employ of any other, employ any man who had for any reason left the service

of, or been discharged by, either of the other said companies. Plaintiff states that he could have found employment in his line of business with some of the other companies as aforesaid, if it were not for the said unlawful agreement between the said companies, and plaintiff charges that the said agreement entered into by the said defendant and said other two companies was unlawful, for the reason that it amounted to a practical blacklisting of such employe who had left the service of such company. Plaintiff states that not only has he been unable to obtain employment because of said agreement, but in bringing this suit this plaintiff has precluded himself from obtaining employment with either of said companies, or any other engaged in a similar business, because he has been and will be blacklisted by the said defendant."

No written evidence of such an agreement was offered or introduced at the trial. The oral testimony relating thereto (Rec., pp. 26, 27, 37, 38, 39, 47) was uncertain, vague and conflicting, and even granting that every inference in favor of such testimony should be indulged, amounted at the most to statements that the companies in question had an understanding or rule whereby neither one would for a period of two years employ in the City of St. Louis any person who had worked in the City of St. Louis for either of the other companies and been discharged or quit the service of said other companies.

There was no evidence of any black list, and plaintiff's averment in his petition that he would be blacklisted because of bringing this suit was flatly denied by the fact that he himself testified that at the time of the trial he was in the employ of the John Hancock Mutual Life Insurance Company, one of the companies named, and had been in their employ since February, 1914 (Rec., p. 28).

Nevertheless, a recovery by plaintiff on the second count of his said petition was sustained and affirmed in spite of the constitutional objections preserved throughout by counsel for the company.

If the alleged agreement between the defendant and the other two companies mentioned were proved, it could only be held unlawful because of some rule of the common law or because of some statute of the State of Missouri.

Counsel for the company submit that the authorities cited under the earlier paragraphs of this argument have conclusively demonstrated that the right to contract is a right guaranteed to the company under the Constitution of the United States, and that this right to contract includes the right to terminate a contract of employment without cause if such termination does not violate the terms of the contract itself or any established custom or usage.

It follows from this conclusion that the right of an employer to contract with an employe includes not only the right to terminate the contract of employment, but also the right to refuse to enter into a contract of employment.

These conclusions are amply supported by the following authorities:

Gillespie v. People, 188 Ill. 176, 52 L. R. A. 283, where the Court said, at page 286:

> "The rights of life, liberty and property embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract (Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454). If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property.
>
> "The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right, not only to contract, but also to terminate contracts (Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; State v. Julow, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781)."

State ex rel. Zillner v. Kreutzberg, 114 Wis. 530, 58 L. R. A. 748, where the Court said at pages 753 and 754:

> "Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudicially, cannot be doubted. The success in life of the employer depends on the efficiency, fidelity, and loyalty of his employes. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer cannot have undivided fidelity, loyalty and devotion to his interests from an employe who has given to an association right to control his conduct. He may by its decisions be required to limit the amount of his daily product. He may be restrained from teaching his art to others. He may be forbidden to work in association with other men whose service the employer desires. He may not be at liberty to work with such machines or upon such materials or products as the employer deems essential to his success. In all these respects he may be disabled from the full degree of usefulness attributable to the same abilities in another who had not yielded up to an association any right to restrain his freedom of will and exertion in his employer's behalf according to the latter's wishes. Such considerations an employer

has a right to deem valid reasons for preferring not to jeopardize his success by employing members of organizations. A man who has by agreement or otherwise shackled any of his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammeled. Whether the workman can find in his membership in such organizations advantages and compensations to offset his lessened desirability in the industrial market is a question each must decide for himself. His right to freedom in so doing is of the same grade and sacredness as that of the employer to consent or refuse to employ him according to the decision he makes. We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employe."

People v. Marcus, 185 N. Y. 257, 7 L. R. A. (n. s.) 282, where the Court said at pages 284 and 285:

"Contracts for labor may be freely made with individuals or a combination of individuals, and so long as they do not interfere with public safety, health, or morals, they are not illegal. The views of this Court as to what constitutes freedom to contract in relation to the purchase and sale of labor, and as to what contracts relating thereto are lawful and enforceable, were stated

with much detail and ability by the members of the court when the cases of National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, and Jacobs v. Cohen, 183 N. Y. 207, 2 L. R. A. (n. s.) 292, 76 N. E. 5, were decided; and the decisions in those cases are substantially controlling in the determination of this appeal.

"In National Protective Asso. v. Cumming, supra, it was said that a person may refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it; but, even if the reason is that the employe refuses to work with another who is not a member of his organization, it does not affect his right to stop work, or to refuse to enter upon employment. The converse of this statement must be true, and an employer of labor may refuse to employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. It is a well-known fact that combinations of employes, and also of employers, require their members to do or refrain from doing many things which they deem to their individual and combined advantage, while a person not a member of such an organization can act in accordance with the terms of such agreement as he may choose to make. A person employing labor may decide that it is to his advantage to employ only union labor, and be willing to enter into an

agreement necessary to procure such labor; or he may decide that it is to his advantage to employ nonunion labor, in which case he may also decide that it is to his advantage to make the employment conditional upon an agreement that such employe will not join or become a member of a labor organization."

It is, therefore, apparent that the Prudential Insurance Company of America could have refused to employ any individuals or class of individuals it saw fit without exposing itself to any action for damages on account of this refusal.

Did the alleged fact that the company had entered into an understanding or agreement with the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company, whereby each agreed not to employ any person to serve in the same district where he had been employed by either of the other companies for a period of two years after he left said employ, subject this company to liability?

The plaintiff alleges that such an agreement is unlawful. If so, it must be unlawful either at common law or by reason of some statute of the State of Missouri. It was not unlawful at common law:

"A conspiracy is sufficiently described as a combination of two or more persons by con-

certed action to accomplish a criminal or unlawful purpose or some purpose not in itself unlawful by criminal or unlawful means."

Pettibone v. United States, 148 U. S. 197.

"It is not an unlawful conspiracy for a combination of employers to refuse employment to any kind or class of workmen. The right so to do is in strict analogy to the right of workmen to combine to refuse to work for an employer who hires men of whom they disapprove or who conducts his business contrary to their views."

12 Corpus Juris 608, citing Sinsheimer v. United Garment Workers, 77 Hun. 215; Goldfield Consolidated Mining Company v. Goldfield Miners' Association, 159 Fed. 500; New York, Chicago & St. Louis Railroad Company v. Schaffer, 65 Ohio St. 414, 62 L. R. A. 931.

In the case last cited the Court said, at page 420:

"It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish, and he cannot be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms, such right is as much inherent in corporate bodies as in natural per-

sons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means."

Another leading case is *McDonald v. Illinois Central Railroad Company,* 187 Ill. 529. In this case the plaintiff, formerly a switchman and conductor on the defendant railroad, brought an action, alleging that there was a conspiracy entered into by all the railroads not to employ any former employe of another railroad unless he produced a clearance card from such railroad, and that the defendant refused to give him such an instrument as would enable him to obtain employment in the railroad business. A demurrer to the petition was sustained. On appeal this action of the lower court was affirmed. The Court held in a very well-considered opinion that no cause of action was stated either for the refusal to issue the clearance card or for the alleged conspiracy.

This rule has also been adopted in the Federal Courts. See case of *Boyer v. Western Union Telegraph Company,* 124 Fed. Rep. 246, where the Court said (pages 249 and 250):

"But it is said that defendant maintains a blacklist containing a list of names of such persons as may have incurred its displeasure and have been discharged from its service, and that,

by methods not known to them, it prevents such discharged persons from getting employment as telegraph operators; that they have blacklisted people solely because they belong to the union, and that they intend to blacklist others for the same thing, etc. We have seen it is not unlawful to discharge plaintiffs because they belong to the union. Is it unlawful for defendants to keep a book showing that they were discharged because they belonged to the union? The union presumably, and especially in view of the allegations in the bill, is an honorable, reputable and useful organization, intended to better the conditions and elevate the character of its members. Is it illegal for defendant to keep a book showing it had discharged members of such a union solely because they belong to it? That seems to be the real essence of the bill. Is it illegal to notify others that it keeps such a book and that they can inspect it, or to inform others what such a book shows? That seems to be the ground of complaint. There can be no question about it; the positive, direct, and unequivocal allegation is that defendant keeps such a book; that plaintiffs are placed on it solely because they belong to the union, and had been discharged solely because they did belong to the union. Can a court of equity grant relief to a man who says for his cause of action that he belongs to a reputable organization, and that he has been discharged solely because he did belong to it; that his employer who discharged him keeps a book on which is placed his name, and has set opposite thereto

the fact that he discharged him solely because he belonged to such organization; and that he gives that information to other persons, who refuse to employ him on that account? Suppose a man should file a bill alleging that he belonged to the Honorable and Ancient Order of Free Masons or to the Presbyterian Church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others for this reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray, on what ground? And yet that is a perfectly parallel case to this as made by the bill.

"Those who may be interested in the questions raised by the demurrer to this bill will be entertained and instructed by reading the following cases, and especially the first: Payne v Western & Atlantic R. R. Co., 49 Am. Rep. 666; Dinah Worthington et al. v. James Waring et al., 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294; Hundley v. Louisville & Nashville Railway Company, 48 S. W. 429, 88 Am. St. Rep. 298; Raymond v. Russell et al., 9 N. E. 544, 58 Am. Rep. 137; McDonald v. Illinois Central R.

R., 187 Ill. 529, 58 N. E. 463; Wabash Railroad Co. v. Hannahan et al. (C. C.), 121 Fed. 563."

This had also been ruled in Missouri prior to the decision in the case at bar. See

Hunt v. Simonds, 19 Mo. 583;
Nations v. Pulse, 175 Mo. 86.

Counsel for the company respectfully submit, therefore, that under all the authorities the alleged agreement between the companies mentioned, even if proved, was not unlawful at common law, and would give no right of action to an employe such as plaintiff in this case.

Counsel for plaintiff has failed to cite any statute of Missouri in support of the contention that this alleged agreement was unlawful.

The so-called "Anti-Trust Law" of Missouri cannot apply, because that statute follows the wording of the Federal "Anti-Trust Law" and is, by its terms, confined to agreements or combinations "to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insurance of property."

Obviously this does not apply to contracts for personal service. This has been held in the case of *State ex rel. v. Associated Press*, 159 Mo. 410, and the Supreme Court of Missouri in the opinion in this case (192 S. W. 387) admits that the alleged agreement in this case cannot be held in violation of the anti-trust law of Missouri.

Counsel for the company also respectfully submit, therefore, that no statute has been suggested which would impose a liability upon the company for its alleged participation in such an understanding or agreement.

The purpose of such an understanding or agreement appears in the record of this case, and in no way supports the claim advanced by the plaintiff of an unlawful conspiracy.

The companies involved are all engaged in the business of soliciting and selling so-called industrial policies of insurance, that is, policies of insurance for small amounts sold to laboring people and people of very moderate means for the purpose of providing a fund to cover the expenses of their last illness and burial. The premiums are payable weekly. Each insured is given, with his policy, a premium receipt book. Notice of the due dates of premiums are not sent to the insured, but an agent of the company calls in person to collect the premium and to receipt there-

for in the receipt book. This agent is the only person connected with the company with whom the insured comes in contact. For all purposes, so far as the insured is concerned, this agent is the company, and this has been held by the courts of Missouri.

Each agent is given a certain territory which is called his debit, meaning that the premiums on the policies in force in that district are charged up to him to collect. He also solicits new insurance in that district. From all these facts it follows that the agent acquires a very large personal following in his limited territory among the holders of industrial insurance. If he were permitted to resign and to enter the employment of a competing company or if the competing companies themselves were to indulge in the practice of enticing such an agent into their employ, the result would follow as indeed it did in the earlier days of this insurance that the agent would thereupon visit the persons with whom he had come in contact by reason of his prior employment and induce them to drop their existing insurance and take out insurance in the company for which he was then working. This would work a great hardship on the insured and would cause much confusion among the companies. All of the benefits which had accrued on the existing policies would be lost and the new company could never be sure that it would keep the insurance obtained in this way.

In this case plaintiff was allowed to recover judgment against the defendant on the second count of plaintiff's petition although it conclusively appeared that the defendant had merely exercised a right guaranteed to it by the Constitution of the United States in a lawful manner for a proper purpose.

This action of the courts of Missouri deprived the defendant of its right of contract and of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It will not do to say that this was mere error or that the company had its day in court.

This company's day in court was not in this instance due process of law. The provisions of the Federal Constitution protecting the property of persons "extends to all acts of the state, whether through its legislative, its executive or its judicial authorities."

Scott v. McNeil, 154 U. S. 34.

And for other authorities to the same effect see

C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226;
Twining v. New Jersey, 211 U. S. 78;
Brand v. Union Elevated Railroad Company, 238 U. S. 586;
Ex Parte Commonwealth of Virginia, 100 U. S. 676.

IX.

The company cannot be prevented from asserting its constitutional rights in the courts of Missouri by judicial fiat.

In the course of the opinion of the Supreme Court of Missouri on first appeal in this case, the Court said, 192 S. W., page 392:

> "That a foreign corporation has no inherent right to exist or to do business in this state is no longer an open question. It derives those rights from the state, impressed with such conditions and burdens as the state may deem proper to impose, and when such a corporation comes into this state to do business, it must conform to the laws of this state and will not be heard to complain of the unconstitutionality of our police regulations (Daggs v. Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638, and cases cited; State ex rel. Equitable Life Assurance Society v. Vandiver, 222 Mo. 206, 121 S. W. 45, and cases cited; Crutcher v. Kentucky, 141 U. S. 47, loc. cit. 59, 11 Sup. Ct. 851, 35 L. Ed. 649)."

The authorities cited in support of this remarkable contention do not in any way support the conclusion there stated, but, on the contrary, clearly hold that foreign corporations as well as individuals and do-

mestic corporations can protect their constitutional rights in the courts of any state.

In the case of *Daggs v. Orient Insurance Company*, the Court discussed at great length the constitutional questions raised by the defendant, a foreign insurance company, and while ruling upon them adversely to the contentions of the defendant, in no way questioned its right to assert them. The only statement in the opinion which could be possibly distorted into an authority for the language used by the Supreme Court of Missouri in this case is a statement that the company could not be heard to complain of the **policy** of the insurance laws of the State of Missouri.

In the case of *State ex rel. v. Vandiver*, also cited as an authority, the Court said, at page 243:

> "The right of the relator to raise the question of the constitutionality of the act of 1907 seems to be conceded in majority opinion, although not discussed."

Finally, in the case of *Crutcher v. Kentucky*, 141 U. S. 47, also cited, the Supreme Court of the United States, held unconstitutional and void a statute of Kentucky attempting to regulate agents of foreign express companies.

X.

CONCLUSION.

The decision of the St. Louis Court of Appeals adopting the prior opinions of the Supreme Court of Missouri in this case and affirming the judgment of the Circuit Court of the City of St. Louis against the company on both counts of plaintiff's petition should be reversed.

The judgment entered on the first count of plaintiff's petition is based upon a statute which violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and is, therefore, invalid and void.

The judgment upon the second count of plaintiff's petition takes the company's property on account of the alleged exercise of a right guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution and, therefore, deprives the company of its property without due process of law.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff in Error, v. ROBERT T. CHEEK, Defendant in Error.	No. 149.

STATEMENT AND BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

STATEMENT.

This case is pending on the docket of this court on writ of error duly allowed (Rec., p. 2) and perfected (Rec., p. 3).

The transcript of the record was filed in the office of the Clerk of this court on October 9th, 1920. The case is numbered 149 on the calendar of the Court and in ordinary course will certainly be called for argument at the current term. The brief for plain-

tiff in error has been prepared, printed, served upon counsel for defendant in error and filed in this court.

Now for the first time counsel for defendant in error has served counsel for plaintiff in error with notice that he intends to submit to this court on Monday, November 21st, 1921, a motion to dismiss the writ of error on the ground that the judgment of the St. Louis Court of Appeals to which the writ of error was directed in this case, is not that of the highest court of the state in which a decision of the suit can be had.

Counsel for plaintiff in error understand that it has become established as a preferred practice of the Court that consideration of motions to dismiss first filed at the term at which the case is to be reached in regular call of the docket shall be postponed until the hearing on the merits is had. It is, therefore, respectfully submitted that such an order should be entered in this case.

The brief on the merits for plaintiff in error, contains a history of this case and an explanation of why the writ runs to the St. Louis Court of Appeals instead of to the Supreme Court of Missouri.

In view of defendant in error's motion to dismiss, however, and in case the Court should at this time desire to consider this motion, counsel for defendant in error will here repeat in more detail, the state-

ment of the history of the case and the reasons why the judgment of the St. Louis Court of Appeals is that of the highest court of the state in which a decision of this suit could be had.

The action was instituted on November 14th, 1912, when the plaintiff filed in the Circuit Court of the City of St. Louis, Missouri, a petition (Rec., p. 8).

This petition was in two counts. The first count recited that the plaintiff, for more than ten years, had been engaged as soliciting agent in the business of industrial and ordinary life insurance, and was not experienced in other lines of business, and had no such acquaintance as would enable him to secure employment except as life insurance solicitor in the City of St. Louis (Rec., p. 9).

Plaintiff further stated that he was in the employ of the defendant from June, 1898, to December 7th, 1911, at which time he resigned and left the service of the defendant. That having been in the employ of the defendant for a period exceeding ninety days, the plaintiff on the 3rd day of October, 1912, demanded a letter from the superintendent of defendant in the City of St. Louis, setting forth the nature and character of the services rendered by plaintiff to defendant and the duration thereof and truly stating for what cause plaintiff had quit such service, but that the defendant, through its superintendent, re-

fused to give plaintiff such a letter, although said letter was required by statute, and that because of said refusal the plaintiff had been unable to secure employment from other life insurance companies in the City of St. Louis and had been damaged in the sum of $2,000 actual damages and $3,000 punitive damages.

The statute referred to by the plaintiff in the first count of his said petition was Section 3020 of the Revised Statutes of Missouri, 1909, which statute reads as follows:

> "Whenever any employe of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of services rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any

sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

The second count of plaintiff's petition (Rec., p. 10) stated that the defendant, the Metropolitan Life Insurance Company of New York, and the John Hancock Mutual Life Insurance Company of Massachusetts, had a monopoly of the business of so-called industrial life insurance in the City of St. Louis. That the plaintiff had for fourteen years been engaged in the business of soliciting applications for industrial life insurance and was unable to earn a livelihood in any other business.

That on December 7th, 1911, plaintiff resigned from the service of the defendant and sought employment in the same line of business from said Metropolitan Life Insurance Company and John Hancock Mutual Life Insurance Company, but was unable to obtain employment from said companies because of an agreement between the three of said companies that no one of them would for a period of two years employ any man who had for any reason left the service of or been discharged by either of the other said companies.

Plaintiff further alleged that by reason of said agreement he had suffered actual damages in the sum

of $3,000 and punitive damages in the sum of $5,000.

The defendant filed a demurrer to each count of plaintiff's said petition, which demurrers were on February 18th, 1918, sustained by the Circuit Court of the City of St. Louis, whereupon the plaintiff declined to plead further and there was judgment on the demurrers for the defendant, from which decision plaintiff appealed to the Supreme Court of Missouri, which court reversed the decision of the Circuit Court and remanded the case for trial on the merits.

See *Cheek v. Prudential Insurance Company of America*, 192 S. W. Rep. 387.

On this first appeal defendant briefed and argued its contentions that Section 3020, Revised Statutes of Missouri, 1909, upon which the first count of plaintiff's petition was founded, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, as well as its contention that to permit a recovery on the alleged cause of action stated in the second count of plaintiff's petition would deprive the defendant of its right of contract and property without due process of law in violation of said first section of the Fourteenth Amendment to the Constitution of the United States. These contentions of defendant were fully discussed by the Court in the

opinion above cited and ruled adversely to the defendant, but in view of the fact that there was no final judgment defendant could not then apply to this court.

After the case was remanded, defendant, on October 8th, 1917, filed an answer to said petition (Rec., p. 11). The answer to the first count of plaintiff's petition contained, first, a general denial, and second, a plea that said **first** count of plaintiff's petition was by its terms founded on Section 3020 of the Revised Statutes of Missouri, 1909, requiring a letter of dismissal to be given employes quitting the service of any corporation doing business in Missouri; that said statute does not impose any penalty upon or give any right of action against said corporation and that said statute was unconstitutional in that it was discriminatory, class legislation and infringed on the right of free speech, all in violation of Section 14 of Article II, of Section 30 of Article II, and of Section 53 of Article IV, of the Constitution of Missouri, and that said statute is likewise unconstitutional in that it deprives this defendant of its property and right of contract without due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

The answer to the **second** count of plaintiff's petition contained, first, a general denial, and second, a plea that to permit a recovery against this defend-

ant because of any alleged agreement with other companies that neither would for a period of two years from the time an employe left the employ of any of the other companies employ any man who had for any reason left the service of or been discharged by either of the other companies, would be to deprive the defendant of its property and of its right to contract without due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

On the issues so made up the case went to trial and resulted (Rec., p. 12) in a verdict in favor of plaintiff on both counts of the petition.

From the judgment entered on this verdict defendant duly appealed to the Supreme Court of Missouri, having preserved throughout the trial, and in its instructions (Rec., p. 50) and motion for new trial (Rec., p. 52) all of the constitutional points raised in its answer, but the Supreme Court of Missouri in an opinion which will be found under the heading of Cheek v. Prudential Insurance Company of America, 209 S. W. 928, refused to take jurisdiction of said cause on the ground that the constitutional questions involved had been decided on the former appeal (192 S. W. 387) and had become the law of the case and that as the verdict was for only $1,500 it was less than the jurisdictional amount required by the statutes of the State of Missouri (Sections 3937 and 3938,

Revised Statutes of Missouri, 1909), and the cause would be transferred to the St. Louis Court of Appeals for final disposition. Defendant's motion for rehearing was overruled (Rec., p. 59).

At this juncture defendant, being in doubt as to whether this decision of the Supreme Court was a final judgment or decree from which writ of error would lie to the Supreme Court of the United States, sued out a writ of error, which was duly allowed and filed as No. 418 of the October Term, 1919, of this court.

The plaintiff, however, filed a motion as defendant in error to dismiss the writ of error on the ground that the decision of the Supreme Court of Missouri was not a final judgment or decree to review which a writ of error to this Court would lie, and on the 8th day of March, 1920, this Court dismissed the writ of error for want of jurisdiction upon the authority of

Schlosser v. Hemphill, 198 U. S. 173, 175;
Louisiana Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, 191;
Grays Harbor Company v. Coats-Fordney Co., 243 U. S. 251, 255;
Bruce v. Tobin, 245 U. S. 18, 19.

Accordingly, on May 1st, 1920 (Rec., p. 67), the cause was submitted to the St. Louis Court of Ap-

peals and on June 17th, 1920 (Rec., p. 67) the St. Louis Court of Appeals affirmed the judgment in favor of plaintiff and against defendant and filed an opinion (Rec., p. 68) (223 S. W. 754) in which the Court adopted and followed the rulings of the Supreme Court.

After motion for rehearing (Rec., p. 72) and motion to certify to the Supreme Court of Missouri on account of the constitutional questions involved (Rec., p. 73) had been overruled by the St. Louis Court of Appeals, this writ of error was sued out and allowed.

The Opinion of the Supreme Court of Missouri on Second Appeal.

For the convenience of this Court counsel for plaintiff in error will here insert the pertinent portions of the opinion of the Supreme Court of Missouri on second appeal in this case.

This opinion has never been officially reported in the Missouri Reports, but may be found in full in 209 Southwestern Reporter at page 928.

The syllabus of the case reads as follows:

> **"The Supreme Court has not jurisdiction of an appeal involving less than the requisite amount on the ground of constitutional questions where such questions were decided on former appeal and the decision was the law of the case."**

The opinion, after reciting the prior history of the case and the mandate of reversal and remand, which had been entered by the Supreme Court of Missouri on first appeal, 192 S. W. 387, L. R. A. 1918-A 166, then discusses the answer filed by the company when the case came up for trial, including the constitutional questions raised in said answer, and gives a brief resume of the facts developed at the trial and the verdict of the jury upon which judgment had been entered for $1,500, and then continues as follows:

> "Our jurisdiction, therefore, depends entirely upon the constitutional questions which the defendant attempts to raise on the face of the record. These questions were before this court in the former appeal, and were expressly decided against the very contention which the defendant is now making (Cheek v. Prudential Ins. Co., 192 S. W. 387, L. R. A. 1918-A 166). We then held that the statute upon which the first count stands imposes the duty upon the corporation, through its superintendent or other proper officer, to issue the letter required, and not upon such officer in his individual capacity; that the duty is imposed for the benefit of the employe injured by its breach, who is entitled to maintain an action therefor; and that the statute, as so interpreted, does not violate any of the several provisions of the Constitution of the United States or of the Constitution of the State of Missouri now urged against its validity. We also held that the second count of this petition states a good cause of ac-

tion, notwithstanding the constitutional and other objections then as now urged against it.

"A motion for rehearing was filed by the defendant, wherein the same constitutional questions were presented for reconsideration and was overruled. Our decision and judgment thereupon became the law of this case, by which the circuit court was bound in the retrial which resulted in this judgment. The defendant's argument in this appeal tends to strengthen our conclusions then expressed. It is founded upon the assertion that it was protected by the federal Constitution as well as by the Constitution of the state in the exercise of its corporate franchise for the purpose of depriving the plaintiff of the right to lawfully dispose of his own skill and labor for his own benefit. The undenied facts in this case illustrate the reasonableness of such exercise of the police power of the state as may at least embarrass corporations which owe their local existence to its laws, in attempts to deprive persons, with whom they have no contract relations, of the right to exercise their personal activities for their own benefit. The right to work, as well as the right to contract, is protected by the Constitution.

"The judgment of the court on the former appeal constitutes the law of the case for the purpose of this appeal. All constitutional questions have been eliminated upon the record, so that there only remained the question whether under the law as declared by the Circuit Court at our command, the judgment for $1,500 should stand.

There was nothing left to invoke the jurisdiction of this court. Had the judgment been for an amount coming within our jurisdiction, the question might have arisen as to whether, on an appeal taken, we should reverse our former decision, as might be done in the case of such an inadvertence as is stated in Bagnell Timber Co. v. Railway, 242 Mo. 11, 145 S. W. 469; but no such case is presented here. No constitutional question remains to be settled (Gabbert v. Railway, 171 Mo. 84, 70 S. W. 891; Tandy v. St. Louis Transit Co. 178 Mo. 240, 77 S. W. 994; Dickey v. Holmes, 208 Mo. 664, 106 S. W. 511; State v. Campbell, 214 Mo. 362, 113 S. W. 1081; Reeves v. Railroad, 251 Mo. 170, 158 S. W. 2; City of Richmond v. Creel, 253 Mo. 256, 161 S. W. 794; State v. Finley, 259 Mo. 414, 168 S. W. 921). Nothing remains but to transfer the cause to the St. Louis Court of Appeals, which is done."

The Opinion of the St. Louis Court of Appeals.

Although the opinion of the St. Louis Court of Appeals affirming the judgment in this case is set out in the record at page 68 and following, counsel for the company will, for the convenience of the Court, here insert the pertinent parts of said opinion.

After briefly stating the prior history of the case and referring to the fact that it had twice been to the Supreme Court of Missouri, the opinion then quoted

from the opinion of the Supreme Court on second appeal, and concluded as follows:

> "With the elimination from the case of the constitutional questions raised by defendant, appellant here, virtually nothing remains in the case for the consideration of this court. The Supreme Court has held that each count of the petition states a cause of action; and the evidence adduced tends to sustain the averments of each count. And in the view taken by the Supreme Court of the cause of action stated in each count of the petition, the evidence appears to be such as to warrant the allowance of punitive damages on each count, on the ground that the acts of defendant complained of were willful, and done with malice, i. e., malice in law, which consists of the intentional doing of a wrongful act without just cause or excuse.
>
> "No question is raised as to the form of the instructions given at plaintiff's request; nor, with the constitutional questions eliminated by the Supreme Court (which alone has jurisdiction in such matters) is there any contention that error was otherwise committed at the trial, beyond the mere statement in appellant's brief that punitive damages were not recoverable—a matter which we have briefly disposed of above. The reason for this may be, as asserted by respondent, that the case is here on this appeal 'as a halting port on its voyage to the Supreme Court of the United States.' In any event, as the case reaches

> us, we regard it as our plain duty to affirm the judgment below."

As hereinbefore stated, the company's motion for rehearing and motion to certify to the Supreme Court of Missouri (Rec., p. 72) were overruled by the St. Louis Court of Appeals.

ARGUMENT.

I.

The first contention made by counsel for defendant in error is that the record does not show that the Supreme Court of Missouri has been called upon to decide whether or not it would grant a writ of certiorari to review the judgment of the St. Louis Court of Appeals, and until that has been done the judgment of the Court of Appeals is not final or that of the highest court of the state in which a decision of the suit can be had.

In support of this contention, counsel for defendant in error cites various provisions of the Constitution of the State of Missouri relating to the jurisdiction of the Supreme Court and of the Court of Appeals, and then cites the case of *Stratton v. Stratton*, 239 U. S. 55.

In the Stratton case, however, it appears that no effort of any kind had ever been made to take the case from the Ohio District Court of Appeals to the Supreme Court of Ohio, and that the case had never been in the Supreme Court of Ohio.

Of course, that case cannot be any authority in the case at bar, where the Supreme Court of Missouri, on second appeal, held that by reason of the fact that all the constitutional questions had been settled on

first appeal, it was without jurisdiction to further consider the cause, and transferred it to the St. Louis Court of Appeals for final judgment.

The courts of Missouri have directly passed upon their jurisdiction in such a situation.

The leading case is that of *First National Bank of Jeannette v. Missouri Glass Company,* 243 Mo. 409. This was a suit upon an assigned account for balance of $1,318. The answer, in addition to a general denial, set up a plea that the plaintiff was a member of a pool or trust in violation of the statutes of the State of Missouri and of the laws of the United States, and for that reason under the state statute defendant was not liable. The Court rendered judgment for defendant, and plaintiff appealed to the Supreme Court of Missouri instead of to the St. Louis Court of Appeals, although the verdict was less than $7,500, on the ground that the Missouri anti-trust laws pleaded in defendant's answer were unconstitutional and void.

The Supreme Court held that it had been repeatedly ruled that both the federal act and the state law were constitutional, and that this was not an open question when the appeal was taken. In transferring the case to the St. Louis Court of Appeals, the Supreme Court said, at page 412:

> "Where constitutional contentions are no longer debatable, this Court will treat their

reassertion as frivolous, and will not permit it to dislodge the otherwise rightful jurisdiction of the Court of Appeals. (State v. Campbell, 214 Mo. 362; Dickey v. Holmes, 208 Mo. 664.)

"If, after the retransfer of this case to the St. Louis Court of appeals, its conformity to the decisions of this Court should be thought by appellant to deny it any right or privilege guaranteed by the Federal Constitution, then a writ of error will lie from that court direct to the Supreme Court of the United States, for in all matters not excluded from its jurisdiction that court is one of final resort (Railroad v. Pearce, 192 U. S. 179; Pearce v. Railroad, 89 Mo. App. 437). This case is transferred to the St. Louis Court of Appeals."

For another and later case in which the Supreme Court of Missouri held that the jurisdiction of the St. Louis Court of Appeals was exclusive and that a judgment rendered by it was final, although a constitutional question was involved, see *Mitchell v. Joplin National Bank*, 201 S. W. 903.

Therefore, it is apparent that the courts of Missouri have determined this question of jurisdiction and have held that in a case such as the case at bar, where the constitutional questions have been disposed of either by prior decision in that case or by other adjudicated decisions and the amount involved is less than $7,500, the jurisdiction of the St. Louis Court of Appeals is exclusive and final.

This Court has also repeatedly held that where the highest court of a state has refused to take jurisdiction of a cause and has remanded the same to a lower court for final disposition, the writ of error should run to the lower court and not to the higher court.

Some of the leading cases announcing this rule are as follows:

Chesapeake & Ohio Railroad Company v. McCabe, 213 U. S. 207;
Louisiana Navigation Company v. Oyster Commission, 226 U. S. 99;
Coe v. Armour Fertilizer Co., 237 U. S. 413;
Western Union Telegraph Co. v. Hughes, 203 U. S. 505;
Callahan v. Bransford, 139 U. S. 197;
Kanouse v. Martin, 15 How. 198;
Kentucky v. Powers, 201 U. S. 1;

In the Powers case last cited, this Court said (50 L. R. A., page 649):

"Under this holding, the accused is not deprived of opportunity to have his rights, of whatever nature, which are secured or guaranteed to him by the Constitution or laws of the United States fully protected by a Federal court. But it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was

based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the Court of Appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the Court of Appeals of that commonwealth, then, after the case is disposed of in that court by final judgment in respect of the matters of which, under the local law, it may take cognizance, a writ of error cannot run from this court **to the trial court** as the highest court of Kentucky **in which a decision of the Federal question could be had**; and this Court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege or immunity asserted. **This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this Court from protecting rights secured by the Constitution and improperly denied in a subordinate state court, although specially set up and claimed.**"

Indeed, the action of this Court in dismissing the writ of error sued out by the company after the decision on second appeal in the Supreme Court of Missouri for want of jurisdiction on the authority of the

cases then cited (252 U. S. 566) and hereinbefore set out was, in effect, a decision that no final judgment then existed or would exist until the St. Louis Court of Appeals had acted in this matter.

II.

Counsel for defendant in error cites the case of State ex rel. Curtis v. Broaddus, 238 Mo. 189, to sustain his contention that in the case at bar counsel for the company should have applied to the Supreme Court of Missouri for a writ of certiorari. While this contention has been disposed of, not only on the facts as shown by the record, but by the authorities cited under the preceding section of this argument, it is interesting to note in what position counsel for the company would have been if they had signed a certificate to the Supreme Court asking for writ of certiorari.

In the first place, it is to be noted that the writ of certiorari which runs from the Supreme Court of Missouri to the Court of Appeals is not a writ of right, nor is it a discretionary writ which may issue in any case. Its use is confined to the exercise of the "superintending control" (mentioned in the Constitution of the State of Missouri) and the writ now runs only where the Supreme Court is of opinion that the particular decision of the Court of Appeals is not in

accord with the last controlling decision of the Supreme Court.

For many years the Supreme Court held that it would issue such writs of certiorari only where the claim was made that the Court of Appeals was exceeding its jurisdiction. See in this connection *State ex rel. Wabash Railroad Company v. Bland*, 168 Mo. 1, where the Court said, at page 7:

> "The case resolves itself then into this: No Federal protection has been invoked and denied to the defendant by the lower courts. The case does not fall within the appellate jurisdiction of this court. The question involved is a simple question of the right of subrogation in equity. The St. Louis Court of Appeals has final appellate jurisdiction in such cases where the amount involved does not confer jurisdiction upon this court, and such is not the case here. Is this, then, a proper case for the exercise of the original and superintending jurisdiction of this court over all inferior courts of record, by the use of the writ of certiorari, under Section 12 of Article VI, Constitution of Missouri? If it is, then any litigant who loses in any ordinary action involving no Federal, or constitutional, right, would have a right to have the decision of any court reviewed by certiorari. The writ of certiorari never was intended to perform such functions. It reaches only questions of jurisdiction. It does not deal with the merits of controversies between the litigants. It acts upon judicial bodies,

and their proceedings, not upon private controversies."

Of recent years the Supreme Court has held that its jurisdiction on certiorari is limited to the determination of whether upon the facts shown in the record the Court of Appeals has announced a conclusion of law contrary to the last previous ruling of the Supreme Court upon the same or a similar state of facts.

The most recent case on this subject is *State v. Reynolds*, 233 S. W. Rep. 483, where the Court said, at page 484:

> "At the threshold of a consideration of the questions presented by relators, let us reaffirm the doctrine which we have firmly enunciated in our most recent pronouncements, to wit, that **in certiorari it is not our province to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but only whether upon those facts it announced some conclusion of law contrary to the last previous ruling of this court upon the same or a similar state of facts** (State ex rel. American Packing Co. v. Reynolds et al., 230 S. W. 642, decided en banc on April 30th, 1921; our number 22290, not yet [officially] reported; State ex rel. Peters v. Reynolds et al., 214 S. W., loc. cit. 122; State ex rel. Mechanics Amer. Nat. Bank v. Sturgis et al., 276 Mo. 559, 208 S. W., loc. cit.

462; Majestic Mfg. Co. v. Reynolds et al., 186 S. W. 1072)."

Therefore in this case counsel for defendant in error would have had counsel for the company make oath to a certificate of certiorari, in which they would have been forced to allege that the St. Louis Court of Appeals had reached a conclusion of law not in accordance with the last previous ruling of the Supreme Court of Missouri on a similar state of facts, although the case had been transferred to the St. Louis Court of Appeals by the Supreme Court on the express ground that sole and exclusive jurisdiction to determine the case was in the Court of Appeals and although the Court of Appeals in its opinion quoted and followed the opinions of the Supreme Court in this very case.

III.

Counsel for defendant in error also insists that counsel for the company should have sued out a writ of error to review the decision of the Supreme Court of Missouri on first appeal (192 S. W. 387). In support of this contention, counsel cites the case of *Northern Pacific Railroad Company v. Ellis*, 143 U. S. 458.

In the first place the decision of this Court in the case of Railroad v. Ellis was not based upon the

grounds stated by counsel for defendant in error, but the writ of error was dismissed on the ground that the Supreme Court of Wisconsin had decided the case upon a nonfederal ground.

This conclusion is stated in the first paragraph of the opinion of Chief Justice Fuller, which counsel for defendant in error has omitted in the citation contained in his brief. This paragraph reads as follows:

> "The motion to dismiss the writ of error must be sustained. The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a federal question and broad enough to maintain the judgment (Hammond v. Johnston, 142 U. S. 73)."

In the second place, in the case of Railroad v. Ellis, the lower court had **overruled** the demurrer and on first appeal the Supreme Court of Wisconsin had affirmed this action of the lower court, and from the subsequent history of the case it appears that all that was then left was to enter judgment in favor of plaintiff, as leave to file an answer was denied when the case was remanded.

In the case at bar, however, the lower court had sustained the company's demurrer to plaintiff's petition, and on first appeal the Supreme Court of Missouri had held that this action was erroneous, as the petition stated a good cause of action and then re-

versed and remanded the case for trial on the merits.

That this was not a final judgment or decree from which a writ of error would lie to this Court has been repeatedly ruled, and counsel for the company will here cite only a few of the many cases in which this Court has so held:

Meagher v. Minn. Thresher Mfg. Co., 145 U. S. 608;
Brown v. Baxter, 146 U. S. 619;
Werner v. Charleston, 151 U. S. 360;
Union Mutual L. Ins. Co. v. Kirchner, 160 U. S. 374.

IV.

If we understand the third point made by counsel for defendant in error, it is that in no event can this Court have jurisdiction of a writ of error running to a Missouri Court of Appeals, because, under the Constitution of Missouri, that court has no jurisdiction to pass upon constitutional questions.

This contention has already been disposed of by the citation under previous paragraphs of this argument of the case of *First National Bank of Jeannette v. Missouri Glass Company* and the case of *Mitchell v. Joplin National Bank, supra.* Moreover, this Court has held in several cases that its writ of error was

properly directed to a Missouri court of appeals. For a few of these instances, see

Missouri, Kansas & Texas Railroad Co. v. Elliot, 184 U. S. 530;
New York Life Ins. Co. v. Dodge, 246 U. S. 357;
Mergenthaler Linotype Co. v. Davis, 251 U. S. 256.

As hereinbefore stated, counsel for the company assume that under its existing rules of practice, this Court will defer consideration of a motion to dismiss filed at this time until the hearing of the case on the merits, but it is respectfully submitted that whether the motion be considered at this time or later it is without merit and should be denied.

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Of Counsel.

No. 149.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, PLAINTIFF IN ERROR,

VS.

ROBERT T. CHEEK, DEFENDANT IN ERROR.

ADDITIONAL STATEMENT AND BRIEF IN SUPPORT OF MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

FREDERICK H. BACON,
Of Counsel for Defendant in Error.

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ADDITIONAL STATEMENT AND BRIEF IN SUPPORT OF MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

STATEMENT.

The court having deferred consideration of the motion to dismiss the writ of error until the final hearing of the case we desire to make this additional statement

and brief on behalf of the defendant in error. Nine years ago defendant in error brought this suit. The plaintiff in error preferred to raise the constitutional questions involved by demurrer instead of by answer. The trial court sustained the demurrer and the plaintiff declining to plead further, final judgment was entered in favor of the defendant company. Whereupon an appeal was taken to the Supreme Court of the State of Missouri which reversed the judgment of the trial court and remanded it for trial.

Cheek v. *Prudential Ins. Co. of America*, 192 S. W. 387, L. R. A. 1918 A, 166.

Under the opinion of the Supreme Court it only remained for the court, or jury, to assess the damages sustained by plaintiff.

The defendant company however raised additional questions of law and contested the case not only on the constitutional ground but upon various other technical objections.

Upon trial judgment in 1917 was entered in favor of plaintiff for $1500.00.

The defendant company then appealed the case to the Supreme Court of Missouri claiming that constitutional questions were involved because under the constitution and laws of Missouri the appeal otherwise would have been taken to the St. Louis Court of Appeals, the amount of the judgment being less than $7500.00.

When the case was reached in the Supreme Court it held,

Cheek v. *Prudential Ins. Co. of America*, 209 S. W. 928,

that because the constitutional questions were eliminated by the opinion and judgment of the court on the first appeal and the amount of the judgment being less than $7500.00 it had no jurisdiction and for that reason transferred the case to the St. Louis Court of Appeals.

A writ of error was taken from this decision of the Supreme Court of Missouri to this court which dismissed the writ of error, no final judgment having been obtained.

The St. Louis Court of Appeals after argument determined the questions involved in the case other than those involved in a determination of the constitutional questions and affirmed the judgment.

Under the Constitution of Missouri the Court of Appeals has no power or jurisdiction to consider constitutional questions.

In the statement of counsel for plaintiff in error it is said that the St. Louis Court of Appeals followed the construction of the constitution by the Supreme Court. This statement is not accurate because the Court of Appeals could not consider in any way any constitutional question.

It will be seen therefore that on the second appeal the Supreme Court of Missouri held that its first decision became the law of the case but it did not say that if the proper proceedings were taken it would not review that decision although it had become the law of the case but held that the amount involved being less than $7,500.00 it had no jurisdiction to disturb the judgment of the trial court.

The Court of Appeals only had jurisdiction to determine other questions than those involved in a determination of the constitutional questions and affirmed the judgment.

Under the Constitution of the State of Missouri the Supreme Court had the power to require on application therefor the transfer of the case back to the Supreme Court by awarding a writ of certiorari. The plaintiff in error not applying for any such review, to apply for which it had the constitutional right, the opinion of the St. Louis Court of Appeals was not "that of the highest court of the state in which a decision in the suit can be had."

An examination of the opinion of the St. Louis Court of Appeals (Rec., p. 68) discloses the fact which cannot be disputed, that the court held that it had no power to pass upon any constitutional question, that power resting exclusively in the Supreme Court of the state, but had only the power to determine the other questions involved and therefore finding no error affirmed the judgment.

The record shows therefore that no federal question was involved in the decision of the St. Louis Court of Appeals to which the writ of error in this case is directed but a writ of error would only lie to the St. Louis Court of Appeals after the plaintiff in error had exhausted its right to a review by the Supreme Court by an application for a writ of certiorari which was never made.

This court cannot say that such an application for a writ of certiorari would have been denied by the Su-

preme Court of Missouri, nor can it be said that if the Supreme Court had awarded the writ of certiorari it would not have reconsidered its former opinion although it had become the law of the case.

Believing that this court was without jurisdiction until the Supreme Court of Missouri had refused to interfere with the decision of the St. Louis Court of Appeals we asked this court to dismiss the writ of error upon three grounds as follows:

First, the judgment of the St. Louis Court of Appeals to which the writ of error was directed was not that of the highest court of the state in which a decision in the suit could be had.

Second, the opinion of the Supreme Court on the first appeal determined the constitutional questions involved and that opinion became the law of the case until reversed or disturbed by a superior court.

Third, that no federal question was involved in the opinion and judgment of the St. Louis Court of Appeals because that court had no jurisdiction under the Constitution of Missouri where a constitutional question was involved.

We submitted with that motion to dismiss the writ of error reference to a few authorities believing that the question was simple and required no extended argument but that the mere statement of facts was sufficient However we desire to submit a brief reference to additional authorities.

I.

The opinion and judgment of the St. Louis Court of Appeals was not that of the highest court of the state in which a decision in the suit could be had.

In the case of

Stratton v. *Stratton*, 239 U. S. 55,

this court said, in a case where judgment was rendered by the Ohio Court of Appeals which it was sought to reverse by a writ of error, as follows:

> The premise upon which the proposition is based being undoubtedly accurate, indeed, not disputable (Ohio Const. Art. 4, Sec. 2; *Akron* v. *Roth*, 88 Ohio St. 457, 103 N. E. 465), we think the motion to dismiss must prevail. True, it is urged that under the Ohio law the jurisdiction of the Supreme Court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest—an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not; that is by *indulging in conjecture as to what would or would not have been the judgment of the Supreme Court of Ohio if it had been called upon to exert the discretion vested in it by state laws.* When the significance of the proposition upon which the claim of jurisdiction is based is thus fixed, it is not open to contention, as it has long since been adversely disposed of. *Fisher* v. *Perkins* (*Fisher* v. *Carrico*), 122 U. S. 522, 30 L. Ed. 1192, 7 Sup. Ct. Rep. 1227; *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116, 43 L. Ed. 635, 19 Sup. Ct. Rep. 404. Indeed, conforming to the rule thus thoroughly established,

the practice for years has been in the various states where discretionary power to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court. See *Western U. Teleg. Co.* v. *Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. Rep. 339; *Norfolk & S. Turnp. Co.* v. *Virginia*, 225 U. S. 264, 56 L. Ed. 1082, 32 Sup. Ct. Rep. 828; *St. Louis, S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

The case of

Great Western Telegraph Co. v. *Burnham*, 162 U. S. 339, 16 S. C. R. 850,

was one in which a writ of error was directed to an inferior state court in Wisconsin by which it was sought to review the judgment of such inferior court entered after reversal by the highest court in the state of a previous judgment and the remand of the case for further proceedings. It was held that such judgment could not be directly reviewed by the U. S. Supreme Court even though the State Supreme Court, if a second appeal were taken, would necessarily affirm the judgment on the ground that the question involved was decided on the former appeal. The court compared the facts with those in the case of *McComb* v. *Commissioners*, 91 U. S. 1.

II.

Until brought before this court by a writ of error directed to the Supreme Court of Missouri, the opinion of that court determines the law of the case and is res adjudicata.

We are aware that this court has held in the case of

Louisiana Navigation Co. v. *Oyster Commission*, 226 U. S. 99,

that the finality of the judgment of the highest court of a state will be determined when a final judgment in the case is rendered but in this case the judgment of the St. Louis Court of Appeals was not a final determination until the Supreme Court of the state had been applied to for a review of its decision.

In the case of

Johnson Steel Street Rail Co. v. *Wharton*, 152 U. S. 252,

this court held that the obligation of the doctrine of *res adjudicata* is in no wise affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate court.

Suppose that this motion to dismiss this writ of error were denied and this court should proceed to a hearing of the case and should disagree with the construction placed upon the Missouri statute by the Supreme Court of that state and reverse the judgment of the St. Louis Court of Appeals, notwithstanding the fact that that court determined no constitutional question, the judgment and opinion of the Missouri Supreme Court would still stand.

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[illegible]is Court of Appeals.

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Co. [illegible] *McCabe*, 213 U. S. 207, because there the writ of
error [illegible]as directed to the same court, namely the Court
of A[illegible]peals of Kentucky, which rendered the final de-
cisio[illegible] and this court on a review of the various judg-
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held [illegible]at it would determine for itself the questions in-
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fore [illegible] under the removal act of Congress.

III.

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cour[illegible] will not assume jurisdiction. It will not assume
juris[illegible]liction where the court whose decision is challenged,
deci[illegible]ed the case upon non-federal questions.

IV.

In the brief of counsel on the motion to dismiss counsel refer to three cases where a writ of error from this court has been directed to a Missouri Court of Appeals.

The first is

Missouri, Kan. & Texas R. R. Co. v. *Elliot,* 184 U. S. 530.

It appears by the statement of facts in that case (184 U. S. 533), that an application was made to the Supreme Court of the State of Missouri for a writ of prohibition against the judges of the Kansas City Court of Appeals to restrain the further exercise of jurisdiction and to require the record to be certified to the Supreme Court which application was denied.

Of course the judgment of the Court of Appeals was therefore that of the highest court in the state in which a decision in the case could be had.

The second case is that of

New York Life Ins. Co. v. *Dodge,* 246 U. S. 357.

In that case in the statement of facts, after referring to the opinion of the Springfield Court of Appeals, this court said (246 U. S. 366), "Effort to secure a review by the Supreme Court failed."

It appears therefore in that case also the writ of error was only applied for after the complaining company had applied to the Supreme Court of Missouri to exercise its jurisdiction.

The third case is that of

Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256.

It appears by the record that the writ of error was dismissed for want of jurisdiction. The court said that the judgment of the Springfield Court of Appeals was final no suggestion being made that further review by the Supreme Court could be had as matter of discretion or otherwise.

The suggestion is made that this motion to dismiss ought to have been made at the October term, 1920, of this court but counsel for defendant in error had no knowledge whatever that the record had been filed until November last when the motion to dismiss was immediately prepared he having received then the first intimation that the record had been printed.

We are aware that we have not reviewed all the cases to which reference might have been made in support of this motion but we believe that authority has been shown calling for a dismissal of the writ of error.

Believing that this will be the disposal of the case we do not attempt to present any authorities or arguments in support of the opinion of the Supreme Court of Missouri on the first appeal.

Respectfully submitted,

FREDERICK H. BACON,
Of Counsel for Defendant in Error.

clauses of the Amendment relied on.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* CHEEK.

ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

No. 149. Argued March 6, 1922.—Decided June 5, 1922.

1. The Service Letter Law of Missouri, requiring every corporation doing business in the State to furnish, upon request, to any employee, when discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving, is not an arbitrary interference with freedom of contract amounting to a deprivation of liberty or property without due process of law. P. 534.
2. This requirement is within the regulatory power of the State over foreign and domestic corporations. Pp. 536, 544.
3. The requirement does not deny the equal protection of the laws in being made of corporations and not of individuals. P. 546.
4. The Federal Constitution imposes no restriction on the States protective of freedom of speech, or liberty of silence, or the privacy of individuals or corporations. P. 543.
5. A decision of a state court holding that an agreement of several insurance companies having a monopoly of a line of insurance business in a city, that neither would employ within two years any man who had been discharged from or left the service of either of the others, was unlawful, and sustaining an action against one of the companies by its former employee for damages resulting from the agreement, does not deprive the defendant of property without due process of law in violation of the Fourteenth Amendment. P. 547.
6. Under Jud. Code § 237, as amended 1916, when a case is properly here on writ of error because involving the constitutionality of a statute, other federal questions which in themselves warrant review only by certiorari, will be determined also. P. 547.

223 S. W. 754, affirmed.

ERROR to a judgment affirming a judgment on verdict for the plaintiff, Cheek, in his action for damages against the Insurance Company.

Mr. John H. Holliday, with whom *Mr. S. W. Fordyce, Mr. T. W. White, Mr. W. H. Woodward, Mr. W. R. Mayne, Mr. Alfred Hurrell* and *Mr. James Guest* were on the briefs, for plaintiff in error.

Mr. Frederick H. Bacon, for defendant in error, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

Robert T. Cheek sued the Prudential Insurance Company of America in the Circuit Court of St. Louis to recover damages upon a cause of action set forth in two counts: First, that the company being a New Jersey corporation conducting a life insurance business in Missouri under license of the insurance department of that State, and plaintiff having been for more than ten years continuously employed in its service, and having resigned said employment and left the company's service, plaintiff demanded of defendant's superintendent a letter setting forth the nature and character of the services rendered by him to said corporation and the duration thereof, and truly stating for what cause plaintiff had quit said service; that defendant, acting through its superintendent, without just cause refused to give to plaintiff such a letter, as provided by statute, and because of this plaintiff had been unable to secure employment and had suffered substantial damages. The second count was based upon an alleged unlawful agreement between defendant and two other companies, the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company, said companies having a monopoly of the industrial life insurance business in St. Louis, to the effect that

neither would for a period of two years after his leaving the employ of either company employ any man who for any reason had left the service of or had been discharged by either of the other companies, by which means plaintiff had been rendered unable to secure employment and had sustained substantial damages.

The first count was based upon § 3020, Missouri Revised Statutes, 1909, which reads as follows: "Whenever any employe of any corporation doing business in this State shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

A general demurrer interposed to each count was sustained by the trial court, and, plaintiff declining to plead further, judgment was rendered for defendant, from which plaintiff appealed to the Supreme Court of the State. That court, construing § 3020, held that it imposed a duty not upon the superintendent or manager personally but upon the corporation acting through its superintendent or other proper officer, to issue the letter; that the statute having imposed this duty for the public benefit

and also for the benefit of the employees of corporations, the public remedy by fine or other penalty was not exclusive and the plaintiff as a party injured was entitled to recover his damages; overruled various constitutional objections raised by defendant to the validity of § 3020, among others that it deprived the corporation of liberty of contract without due process of law and denied it the equal protection of the laws, in violation of the Fourteenth Amendment; held that the agreement or combination alleged in the second count gave the corporations a monopoly in their business, contrary to the law and public policy of the State, and if it prevented plaintiff from obtaining employment entitled him to recover his damages caused thereby; sustained both counts on all points, reversed the judgment, and remanded the cause for trial. 192 S. W. 387.

Defendant thereupon answered the petition, reiterating in its plea to the first count the constitutional objections to § 3020, and in its plea to the second count averring that to permit a recovery against it by reason of the alleged agreement between the companies would deprive defendant of its property and its right to contract without due process of law in violation of the Fourteenth Amendment.

On the issues so made up, the case went to trial and resulted in a verdict in favor of plaintiff upon both counts. Defendant having reserved its constitutional points, appealed from the resulting judgment to the Supreme Court, which, however, refused to take jurisdiction on the ground that all constitutional questions had been decided on the former appeal and that the verdict, being for only $1500, was less than the jurisdictional amount required by statute; and hence transferred the cause to the St. Louis Court of Appeals for final disposition. 209 S. W. 928. Defendant, treating this decision of the Supreme Court as a final judgment reviewable by writ of error from this court, sued out such a writ, and upon the ground that the judgment

was not final under the state law the cause was dismissed March 8, 1920. 252 U. S. 567. Thereafter it was submitted to the St. Louis Court of Appeals, which in conformity to the former opinion of the Supreme Court affirmed the judgment (223 S. W. 754), overruled a motion for rehearing and refused an application for certification of the case to the Supreme Court. A writ of error from this court to the St. Louis Court of Appeals followed, under § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

A motion to dismiss the latter writ, based upon the ground that the judgment of the Court of Appeals is not that of the highest court of the State in which a decision in the suit could be had, because the first decision of the Supreme Court rendered the constitutional questions *res judicata*, and that under the state constitution the Court of Appeals has no jurisdiction to pass upon questions of that character, manifestly must be denied, and the case considered on its merits.

The argument in support of the contention that the Service Letter Act is repugnant to the due process of law clause of the Fourteenth Amendment in brief is that at common law an employer is under no obligation to give a testimonial of character or clearance card to his employee; that no man is compelled to enter into business relations with another unless he desires to do so, and upon the dissolution of such relations no man can be compelled to divulge to the public his reasons for such dissolution; that it is a part of every man's civil rights that he be at liberty to refuse business relations with any other person, whether the refusal rests upon reason or is the result of whim, caprice or malice, and with his reasons neither the public nor third persons have any legal concern; and that in the absence of a contract either employer or employee may sever the relation existing between them for any reason or without reason and may not be compelled to divulge

the reason without material interference with his fundamental rights. Assuming the rules of the common law to be as stated, it is obvious that to say they have an unqualified and universal application unalterable by statute, begs the question at the outset.

Section 3020 of the Revised Statutes of Missouri, now a part of the general corporation laws of the State, was derived from an Act of April 14, 1905 (Mo. Laws 1905, p. 178), entitled "An Act for the protection of laboring men by requiring employing corporations to give letter showing service of employe quitting service of such corporation, and providing penalty for violation of this act." In giving its genesis the Supreme Court declared (192 S. W. 389): "Prior to the enactment of this statute a custom had grown up in this state, among railroad and other corporations, not to employ any applicant for a position until he gave the name of his last employer, and upon receiving the name, it would write to said former employer, making inquiry as to the cause of the applicant's discharge, if discharged, or his cause for leaving the service of such former company. If the information furnished was not satisfactory, the applicant was refused employment. This custom became so widespread and affected such vast numbers of laboring people it became a public evil, and worked great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces. The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the state to ascertain the degree of the intelligence as well as the honesty, capacity, and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom." And again, (p. 392): "The statute under consideration imposes no unjust burden or expense upon the respondent or other

corporations doing business in this state. It was designed to protect the public interests as well as the wage-earner, against an injurious custom given birth to and fostered by said corporations. That a foreign corporation has no inherent right to exist or to do business in this state is no longer an open question. It derives those rights from the state, impressed with such conditions and burdens as the state may deem proper to impose, and when such a corporation comes into this state to do business, it must conform to the laws of this state, and will not be heard to complain of the unconstitutionality of our police regulations."

That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair* v. *United States,* 208 U. S. 161, 174; *Coppage* v. *Kansas,* 236 U. S. 1, 14.

But the right to conduct business in the form of a corporation, and as such to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law; and a State in authorizing its own corporations or those of other States to carry on business and employ men within its borders may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.

The statute in question is of this character; in it the legislature has recognized that, by reason of the systematic methods of engaging and dismissing employees that

employing corporations themselves established, "letters of dismissal," or something of the kind, are not only customary but a matter of necessity to those seeking employment, as well as to the corporations themselves, perhaps more necessary to those seeking employment, because of their want of organization, than to the corporations.

Can it be called an unreasonable or arbitrary regulation that requires an employing corporation to furnish to an employee, who after having served it for a time is discharged or voluntarily quits the service, a letter signed by the superintendent or manager setting forth the nature, character and duration of the service rendered and for what cause, if any, he left the service? It does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon. So far as construed and applied in this case it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even indirectly, with the liberty of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a "reference" or "character," a brief statement of his service with the company according to the truth, a word of introduction to be his credentials where otherwise the opportunity of future employment easily might be barred or impeded.

That statutes having the same general purpose, though sometimes less moderate provisions, have been adopted in other States attests a widespread belief in the necessity for such legislation. Indiana Rev. Stat. 1901 (Horner), § 5206r; Acts 1911, c. 178; Acts 1915, c. 51; Montana Rev. Codes 1907, §§ 1755–1757; Nebraska Rev. Stat. 1913, §§ 3572–3574; Oklahoma Rev. Laws 1910, § 3769; Texas

Rev. Civil Stat. 1911, Art. 594. Fifty years ago, in an act for the protection of seamen, Congress established and still maintains a provision that upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of discharge, in a prescribed form which calls for numerous identifying particulars and permits a statement of the seaman's character and capacity. Act June 7, 1872 c. 322, § 24, 17 Stat. 262, 267, 280; Rev. Stats. § 4551; Table B, p. 896.

Plaintiff in error places much reliance upon expressions of opinion contained in a number of cases in the state courts, chiefly the following:

Wallace v. *Georgia, C. & N. Ry. Co.*, 94 Ga. 732. Here the Supreme Court of Georgia held that "An Act to require certain corporations to give to their discharged employees or agents the causes of their removal or discharge, when discharged or removed," was contrary to the fundamental law of the State, on the ground that the public, whether as a multitude or a sovereignty, had no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public, but for private information as to the reasons for discharges; and that the statute was violative of the general private right of silence enjoyed in that State by all persons, natural or artificial, from time immemorial; liberty of speech and of writing being secured by the state constitution, "and incident thereto is the correlative liberty of silence, not less important." The case obviously is not in point, since the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.

Atchison, Topeka & Santa Fe Ry. Co. v. *Brown*, 80 Kans. 312, held that a service letter statute of that State (Laws 1897, c. 144; Gen. Stat. 1901, § 2422) was repug-

nant to § 11 of the bill of rights of the State and "an interference with the personal liberty guaranteed to every citizen by the state and federal constitutions." The section of the bill of rights relied on was "All persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right." This of course has no present significance. The reference to the Federal Constitution was to § 1 of the Fourteenth Amendment, but the opinion does not indicate what bearing, if any, the due process of law clause was deemed to have. It appears rather that the right to discharge a servant for any reason or for no reason was thought to be one of the "privileges or immunities of citizens of the United States." But, as this court more than once has pointed out, the privileges or immunities of citizens protected by the Fourteenth Amendment against abridgment by state laws are not those fundamental privileges and immunities inherent in *state* citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution, or its laws. *Slaughter-House Cases,* 16 Wall. 36, 72–74, 77–80; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Maxwell* v. *Bugbee,* 250 U. S. 525, 538. The reasoning of the Supreme Court of Kansas in this case is not convincing. The case was cited in *Coppage* v. *Kansas,* 236 U. S. 1, 24; not however in approval of its views upon the question now presented, but in order to show that the court had recognized that under the law of the State an employer might discharge his employee for any reason or without reason, and could not be compelled to give a reason where one did not exist; a view inconsistent as we thought with the same court's decision in the *Coppage Case,* then under review.

The legislature of Texas placed upon the statute book an act aimed at "Blacklisting" (Rev. Civil Stat. 1911, Art. 594), which required that any corporation or receiver of the same, doing business in the State, having discharged

an employee should furnish him with a true statement of the cause of discharge, or a statement in writing that he had left the service voluntarily; besides other provisions much more onerous and which were especially criticised by the Supreme Court of the State when it came to pass upon the constitutionality of the act.

This statute, having twice been sustained as constitutional by the Court of Civil Appeals (*St. Louis Southwestern Ry. Co. of Texas* v. *Hixon* [1910], 126 S. W. 338; reversed by the Supreme Court, without passing upon the constitutional question, 104 Tex. 267, 270; *St. Louis Southwestern Ry. Co. of Texas* v. *Griffin* [1913], 154 S. W. 583), was passed upon by the Supreme Court in the latter case, and the act declared invalid, 106 Tex. 477 (1914). That court declared that the liberty of contract was a natural right of the citizen beyond the power of the Government to take from him; in effect that the same liberty pertained to a corporation employer as to an individual employee; by implication that the statutory provision requiring such an employer to furnish its discharged employee with a statement of the cause of his discharge amounted to a destruction of the corporation's right to discharge the employee without cause and "a violation of the constitutional right of equal protection of the law as secured by the Fourteenth Amendment"; that to confer upon an employee the right to recover damages if the corporation upon his dismissal should fail to give him a statement of the true cause of his discharge was "a violation of the natural right to speak or be silent, or the liberty of contract secured by the constitution of this State and of the United States"; besides much in criticism of certain so-called inquisitorial provisions not found or paralleled in the Missouri statute that we are considering.

Opinion of the Justices, 220 Mass. 627, is an advisory opinion to the senate of the Commonwealth upon a pro-

posed measure of legislation, to the effect, " that no employee of a railroad corporation shall be disciplined or discharged in consequence of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information "; and that the corporation be prohibited from discharging an employee without compliance with the proposed provisions, under a heavy penalty. The opinion appears to have been based upon the ground, among others, that the proposed bill would require the corporation to produce at a hearing the person from whom it had derived its information even though such person might be a stranger to the railroad and declined for any reason or was unable to confront the employee. After quoting views expressed by this court in *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45, 53; *Adair* v. *United States*, 208 U. S. 161, 174–175; *Coppage* v. *Kansas*, 236 U. S. 1, 14, the opinion proceeded: " It seems to us impossible to say that the right of an employer to discharge an employee because of information affecting his conduct in respect of efficiency, honesty, capacity, or in any other particular touching his general usefulness, without first providing a hearing, stands on a different footing or is less under the shield of the constitution than the right held to be secured in the *Adair* and *Coppage Cases*. . . . In the absence of a contract, conspiracy or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also as a prerequisite to the exercise of his right, to enable the employee to make

a statement in the presence of some one else,—a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute. . . ."

For reasons thus outlined five of the seven justices expressed the view that the proposed bill would be invalid as an unreasonable interference with the liberty of contract; and for other reasons not necessary to be mentioned. It will be noted that the proposed bill had a direct effect upon the relations between employer and employee, pending the employment, which the Missouri statute has not.

We have examined the opinions referred to with the care called for by the importance of the case before us; and are bound to say that, beyond occasional manifestations of a disinclination to concede validity to acts of legislation having the general character of Service Letter Laws, we have found nothing of material weight; no well-considered judgment, much less a formidable body of opinion, worthy to be regarded as supporting the view that a statute which, like the Missouri statute, merely requires employing corporations to furnish a dismissed employee with a certificate setting forth the nature and character of the service rendered, its duration, and for what cause, if any, the employee has left such service, amounts to an interference with freedom of contract so serious and arbitrary as properly to be regarded a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment.

The cases cited from Georgia, from Kansas, and from Texas place material dependence upon provisions of the several state constitutions guaranteeing freedom of speech, from which is deduced as by contrast a right of privacy called the "liberty of silence"; and it seems to be thought that the relations between a corporation and its employees and former employees are a matter of wholly private con-

cern. But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence"; nor, we may add, does it confer any right of privacy upon either persons or corporations.

Previous decisions of this court are far from furnishing support for the contentions of plaintiff in error. *Allgeyer* v. *Louisiana*, 165 U. S. 578, related to legislation of a wholly different character and contains nothing that bears upon this. *Lochner* v. *New York*, 198 U. S. 45, dealt with a statute concededly valid if enacted in the interest of the public health, and held it void on the ground that in truth it was not, within the fair meaning of the term, a health law but was an illegal interference with the right of individuals to make contracts upon such terms as they might deem best. *Adair* v. *United States*, 208 U. S. 161, 174–175; *Coppage* v. *Kansas*, 236 U. S. 1, 17, dealt with statutes—the former with an act of Congress making it criminal for a common carrier in interstate commerce to discharge an employee because of his membership in a labor organization; the latter with a state law making it criminal to prescribe as a condition upon which one might secure or retain employment that the employee should agree not to become or remain a member of any labor organization while so employed; and this in the absence of contract between the parties, coercion on the part of the employer, or incapacity or disability on the part of the employee. In accord with an almost unbroken current of authority in the state courts holding statutes of that character to be invalid, this court came to a like conclusion. In the latter case there was a direct interference with freedom in the making of contracts of employment not asserted to have relation to the public health, safety, morals or general welfare beyond a purpose to favor the employee at the expense of the employer, and

to build up the labor organizations, which we held was not properly an exercise of the police power. This statute, in making it criminal, as it did upon the construction adopted and applied, for an employer to prescribe as a condition of employing or retaining a man competent and willing to assent to the condition, that he should agree not to become or remain a member of a labor organization while so employed, the employee being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice, in effect made it a compulsory and unwelcome term of the employment that the employee *must* be left free to join a labor union; membership in which reasonably might be expected to interfere materially with the member's fidelity to his employer.

As has been shown, the Missouri statute interposes no obstacle or interference as to either the making or the termination of contracts of employment, and prescribes neither terms nor conditions. The Supreme Court of the State, having ample knowledge of the conditions which gave rise to the particular legislation, declares with an authority not to be denied that it was required in order to protect the laboring man from conditions that had arisen out of customs respecting employment and discharge of employees introduced by the corporations themselves. It sustains the act as an exercise of the police power, but in truth it requires no extraordinary aid, being but a regulation of corporations calling for an application of the familiar precept, *sic utere tuo*, etc., in a matter of general public concern. Except by consent of the State the corporation, foreign or domestic, would have no right to employ laborers within its borders. A foreign corporation does not, as intimated by the court below, waive any constitutional objection by coming in (see *Terral* v. *Burke Construction Co.*, 257 U. S. 529). But it has no valid objection to such reasonable regulations as may be prescribed for domestic corporations similarly

circumstanced. The State with good reason might regulate the terms and conditions of employment, including the methods of accepting and dismissing employees, so as to prevent the corporations from producing undue detriment to the individuals concerned, either while employed or when afterwards they are called upon to seek other employment. In our opinion, no danger of "blacklisting" is necessary to justify legislation requiring that corporations dismissing employees furnish them with a certificate stating the period of the service, its nature and character, and the cause, if any, that led to its termination. It might be recognized that in the highly organized conditions of industry now prevailing—largely developed by the corporations themselves and to which their success is greatly due—it is not to be expected that unemployed men can obtain responsible employment without some credentials proceeding from a former employer. The legislature might believe it to be well understood that a period of employment by a corporation—notably so in the case of insurance companies—is a test of capacity, fidelity and the other qualities that go to make efficiency; that such a corporation may operate as a training school fitting employees not only for its own but for other lines of employment. Such a training may almost inevitably produce effects upon the individuals in forming both character and reputation—effects that cannot be brought to an end at the will of the employee or of the corporation or both of them combined, although the employment may be terminated at the will of either; but may continue while the employee lives; his employment with the corporation remains a part of what is called his "record," by which he must be judged whenever afterwards he may be in search of employment. The reputation of the dismissed employee is an essential part of his personal rights—of his right of personal security (1 Black. Com. 129; 3 *id.* 119). Even the common law regarded

a man's public repute as a fact having a bearing upon his ability to earn a livelihood; looked upon a good reputation in a particular trade or calling as having special pecuniary value; regarded a prospective employer as privileged to make inquiries about what his would-be employee had done in a former place of employment; conferred upon the former employer a privilege to communicate the truth in reply. What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping, and to convert what otherwise might be but a legal privilege, or under prevailing customs a "moral duty", into a legal duty, by requiring, as this statute does, that when an employee has been discharged or has voluntarily left the service it shall give him, on his request, a letter setting forth the nature and character of his service and its duration, and truly stating what cause, if any, led him to quit such service.

It is not for us to point out the grounds upon which the state legislature acted, or to indicate all the grounds that occur to us as being those upon which they may have acted. We have not attempted to do this; but merely to indicate sufficient grounds upon which they reasonably might have acted and possibly did act to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law.

The argument under the "equal protection" clause is unsubstantial. As we are assured by the opinion of the Supreme Court, the mischiefs to which the statute is directed are peculiarly an outgrowth of existing practices of corporations and are susceptible of a corrective in their case not so readily applied in the case of individual employers, presumably less systematic in their methods of

employment and dismissal. There is no difficulty, therefore, in sustaining the legislature in placing corporations in one class and individuals in another. See *Mallinckrodt Chemical Works* v. *St. Louis*, 238 U. S. 41, 55–56. And the act applies to all corporations doing business in the State, whether incorporated under its laws or not.

It is assigned for error, aside from the statute, that the decision of the Missouri court sustaining the cause of action under the second count amounts to depriving plaintiff in error of property without due process of law. This point was set up properly in the state courts as a special claim of immunity under the Fourteenth Amendment; and although under § 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, it could not have been made the basis of a writ of error from this court, but only a writ of certiorari, we think that, by the fair intendment of the act, since the record has been brought here properly under a writ of error because involving the constitutionality of a statute, plaintiff in error is at liberty to assign any other ground of error therein, based upon an adverse decision by the state court of last resort upon any right, title, privilege or immunity especially set up or claimed under the Constitution or laws of the United States.

The pith of the objection to the second count is that to permit a recovery against plaintiff in error on account of the agreement said to have been made between it and two other companies having a monopoly of the industrial life insurance business in the City of St. Louis, to the effect that neither of the three would within two years employ any man who had left the service of or been discharged by either of the others, was equivalent to depriving it of property without "due process of law." The Supreme Court held (192 S. W. 393), that the corporations had no lawful right to enter into a combination or

agreement the effect of which was to take from them the right to employ whomsoever they deemed proper, and at the same time deprive former employees of their constitutional right to seek employment. It seems to us clear that the State might, without conflict with the Fourteenth Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And for the purposes of our jurisdiction it makes no difference, under that Amendment, through what department the State has acted. The decision is as valid as a statute would be. No question of "equal protection" is raised here.

The judgment under review must be and is

Affirmed.